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CONSTITUTIONALISM AND PUBLIUS' CRITIQUE OF POPULAR GOVERNMENT

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For Melanie, a true אשת לפידות

רבי יוחנן הסנדלר אומר:
כל כנסיה שהיא לשם שמים, סופה להתקים;
ושאינה לשם שמים, אין סופה להתקים.

–פרקי אבות ד:יא

Rabbi Yochanan the sandal-maker said:
Any assembly that is for the sake of heaven shall endure;
Any assembly that is not for the sake of heaven shall not.

-Pirkei Avot 4:11

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ABSTRACT

This dissertation takes up two related questions: What is a constitution and why have one? It seeks answers in one of the earliest and most comprehensive works of modern constitutionalism: *The Federalist*.

In fine, the dissertation argues that for Publius—the pseudonymous author of *The Federalist*—a constitution is a political arrangement designed to constrain public power for the purpose of defeating the problem of judging in one's own case. In light of the Roman law maxim *nemo iudex in sua causa*, the dissertation refers to this problem as the "*nemo iudex* problem." Popular governments like republics are always at risk of the *nemo iudex* problem. And the problem is often fatal. In popular governments, every decision made by the people is simultaneously a private one and a public one. The temptation to create and enforce rules in a self-serving manner proves too much for ordinary citizens or their representatives. Public institutions come to serve private ends, not public ones, and the republic unravels.

The Federalist betrays a deep concern with the *nemo iudex* problem. For starters, the *nemo iudex* problem underlies the problem of faction in Number 10, which few commentators have emphasized. But Publius' attention to the *nemo iudex* problem also drives his critiques of other structural forms like the confederation of republics, the mixed regime, and a pure separation of powers. His analysis of each of these political structures points to the same conclusion: Of their own force, none are able to secure republican stability in the face of the *nemo iudex* problem. For Publius, then, nascent America faces a dilemma: On one hand, the new American regime must be strictly republican; on the other, no known forms of republican rule have successfully protected a republic from the *nemo iudex* problem.

After grounding this dilemma in the text, the dissertation argues that *The Federalist* presents a novel theory of constitutionalism to navigate the dilemma. According to Publius, a constitution is a form of government that combines three related but distinct features. I call these features "founding," "horizontal monism," and "vertical dualism." Founding provides a point in time at which all legitimate political authority comes into existence. Horizontal monism channels all legitimate political authority into a legal system. And vertical dualism provides a structure to the legal system according to which there are two levels of law. When these three features coincide, a constitution obtains, and the constitution can take certain actions for popular majorities and officers off the table. Moreover, the division between higher law and lower law entails, at least in the republican context, that only supermajorities should be empowered to make higher law. Decisions made by supermajorities are less likely to aim at private concerns, making higher law less likely to be destructively manipulated. The dissertation concludes by discussing Publius' theory of constitutional enforcement, according to which independent judges must be the guardians of the constitution, and examining several limitations recognized in Publius' theory of constitutionalism.

ACKNOWLEDGEMENTS

In his *Mishneh Torah*, Maimonides explains that "there is no greater honor than that due a teacher." Although a parent gives life, a teacher "teaches wisdom," and that is our final end as human beings. Fortune has been kind to bring me within the orbit of many superb teachers over the years. I hope this short note provides at least some of the honor they are due.

My utmost thanks are for Nathan Tarcov. I first entered his classroom in the autumn of 2011 as a second-year undergraduate; at the time, I was utterly convinced that truth and morality were illusory. His introductory course on Plato, Aristotle, St. Thomas, and Machiavelli was pivotal for me. And after that, he encouraged my intellectual curiosities and ambitions at every turn: my wish to take his advanced seminar on *erôs*, summer programs in political philosophy, and even my first job out of college at *National Affairs*. Most of all, he helped me come back to the University of Chicago for graduate school and advised me through coursework, the fundamentals exam, teaching requirements, a dissertation proposal, a detour to law school, and this dissertation, which has been a long time in coming. At virtually every stage of my education, he has, like Vergil, gently guided me away from pitfalls and kept my eye on the path ahead. It has been a true education for liberty.

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Chapter 3. I first came across Professor Baude when I attended law school, but since then he has always provided honest and encouraging academic and professional advice. As I had hoped, he brought this dissertation closer into conversation with legal scholarship. And he has proved a role model for an honest and compelling legal scholar. This dissertation would be far worse without their guidance and careful attention.

I owe a debt of gratitude to many other teachers over the years: high school teachers like Scott Cotton and Andy Mercurio, who first gave me a taste of the life of the mind; Gabriel Lear, Heinrich Meier, and Ralph Lerner, who opened new philosophical vistas for me and showed by example the joy of teaching; and law professors like Troy McKenzie, Richard Epstein, Akhil Amar, and Nicholas Parrillo, who showed patience as this political theorist tried to learn the law. And my thanks are owed to many other friends and interlocutors over the years: Paul Goodrich, Josh Trubowitz, Mark Reid, Jeremy Rozansky, Luke Foster, Yishai Schwartz, Yuval Levin, Steven Menashi, and many more. In their own way and at their own time, each has been a teacher to me.

My grandmother, Annette Silver, always says her grandchildren are "smarter than ten colleges." That is a doubtful proposition as applied to me, but it illustrates the kind of encouragement I received from my parents and grandparents, who always put my education first. My parents especially endured hardship to ensure that every door was open to me. I would not be where I am today without my family's encouragement or their rightly ordered priorities. For that I am forever grateful.

My daughters Ayelet and Aviva have given me fortitude, resolve, and—critically—joy in my hardest moments. Parenthood delayed this dissertation, yes, but each smile has been worth a thousand academic accomplishments. I hope there comes a day when they stumble upon my old copy of *The Federalist* and we can read it together.

Undoubtedly, they'll teach me much more than I will them. But until that day arrives, I hope that my parenting will serve as prepayment on the debt I will incur.

My deepest gratitude is reserved for my wife, Melanie. I learned much from writing this dissertation. But I learned only one thing with certainty: Without her encouragement and unspeakable patience, this manuscript never would have been completed. She is far, far more than I deserve—a wise teacher, an incomparable friend, a talented reader and writer, and a resolute partner. Except for making the questionable decision to marry me, she is just perfect, and it is the greatest honor and accomplishment of my life to build a family with her. I dedicate this dissertation to her with adoration and admiration.

INTRODUCTION

Like democracy, constitutionalism has never enjoyed as much success as it does today. Around 1800, few sovereign states had written constitutions. But by the dawn of the 21st-century, there existed about as many constitutions as there were sovereigns in existence—nearly 200.[1] The ends of World War II and the Cold War each generated an explosion in constitutionalism, with the effect that constitutions are now "nearly universal."[2] Between 1789 and 2021, some 215 sovereign entities have drafted and put into effect almost 800 distinct constitutions.[3] It is only a slight overstatement to say that virtually every human being on earth lives, in one form or another, under a written instrument the purpose of which is to describe the powers of government. Despite substantial disagreement about the origins of constitutionalism,[4] there is little question that the contemporary world order bears a commitment to constitutionalism in name if not also in substance.

Yet in recent years the theoretical consensus in favor of constitutionalism has frayed. A pessimist could say that it is even coming to an end. Some legal and political

1. *New Constitutions*, COMPARATIVE CONSTITUTIONS PROJECT, https://comparativeconstitutionsproject.org/ccp-visualizations.

2. Zachary Elkins & Tom Ginsburg, *What Can We Learn from Written Constitutions?*, 24 ANN. R. POL. SCI., 321, 323 (2021).

3. *Id.* at 325.

4. *Compare* LINDA COLLEY, THE GUN, THE SHIP, AND THE PEN: WARFARE, CONSTITUTIONS, AND THE MAKING OF THE MODERN WORLD (2021) (arguing that the prevalence of constitutions arose from war, communications technology, and travel), *with* DIETER GRIMM, CONSTITUTIONALISM: PAST, PRESENT, AND FUTURE, 51-53 (2016) (arguing that constitutionalism appeared and flourished under conditions where the state became separate from society and law experienced a turn to positivism).

theorists are now launching full-scale assaults on constitutionalism. These are not attacks on particular constitutions or particular types of constitutional provisions; those committed to constitutionalism have had and continue to have such criticisms.[5] Instead, the new criticism focuses on the desirability of having a constitution in the first instance. One recent book attacks constitutionalism on the ground that constitutionalism cannot make good on its promise to anchor legal legitimacy to popular support.[6] To avoid any confusion about where the author stands on the issue, the book is titled *Against Constitutionalism*. In America, the cradle of modern constitutionalism, academics have made a similar turn. Most aggressively, two prominent legal academics recently authored a popular essay encouraging Americans to "reclaim America from constitutionalism."[7] For these scholars, constitutionalism is a kind of "antipolitics" that substitutes "claims about the best reading of some centuries-old text or about promises said to be already in our traditions for direct arguments about what fairness or justice demands."[8] Instead, they encourage Americans to, among other things, "do politics through ordinary statute," thereby removing all formal distinctions between (and thus functional benefits of having) higher and lower law.[9] What these critiques of constitutionalism share is an

5. *See, e.g.*, SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2008).

6. *See generally* MARTIN LOUGHLIN, AGAINST CONSTITUTIONALISM (2022). For another book-length project that argues constitutions ought not be used to constrain present popular majorities, *see* RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENSE OF CONSTITUTIONAL DEMOCRACY (2007).

7. Ryan D. Doerfler & Samuel Moyn, *The Constitution Is Broken and Should Not Be Reclaimed*, N.Y. TIMES, Aug. 19, 2022, https://www.nytimes.com/2022/08/19/opinion/liberals-constitution.html.

8. *Id.*

9. *Id.*

understanding that constitutionalism and popular rule are opposed. Constitutionalism, they say, broadly aims to limit government action, so when the government has a democratic character, constitutionalism effectively serves to frustrate the will of the people in whose name the government is said to act.[10]

The foes of constitutionalism raise serious objections worthy of consideration. If our primary commitment is to democracy (broadly understood), not to constitutionalism, then maybe we ought to consider jettisoning constitutionalism if it cannot be reconciled with popular government. Alternatively, if constitutionalism creates insurmountable costs to effecting necessary (perhaps even existentially necessary) policies, then constitutionalism may pose affirmative harm. Robert Jackson worried that applying "doctrinaire logic with[out] a little practical wisdom" would turn the U.S. Constitution into a "suicide pact,"[11] but perhaps his worry applies to constitutionalism more generally. If constitutionalism imposes unsustainable costs on human flourishing, if constitutionalism is in tension with higher order commitments we might have—then what basis is there for preserving constitutionalism as a cornerstone of the modern political way of life? Why have a constitution in the first place?

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10. For other examples of this critique of constitutionalism, *see* Jeremy L. Waldron, "Constitutionalism—A Skeptical View," in CONTEMPORARY DEBATES IN POLITICAL PHILOSOPHY, 269 (Thomas Christiano & John Christman eds. 2009). For an account that narrows the democratic critique of constitutionalism to a critique of judicial review, *see* Nikolas Bowie, *The Contemporary Debate over Supreme Court Reform: Origins and Perspectives*, presented to the Presidential Commission on the Supreme Court of the United States, June 30, 2021, https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony.pdf. For a response to these criticisms, which differs from this dissertation with respect to its reframing of democracy and its eschewal of *The Federalist*, *see* CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT (2007).

11. Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

This dissertation seeks to provide an answer to these questions. To do so, it turns to *The Federalist*. The American Founding was among the first serious attempts to put into effect a constitution of the modern kind. For that reason, it might be supposed that the most interesting—perhaps even the most persuasive—arguments in favor of constitutions were presented at that time; advocates of constitutionalism were under the greatest pressure to explain and justify constitutionalism over and against incumbent theories of politics, such as absolute monarchy or parliamentary sovereignty. At the very least, it would be difficult and unwise to interrogate later attempts to justify (or critique) constitutionalism without first having a firm view of the American Founding's basic argument for constitutionalism. This dissertation seeks to start from that more modest place. And rather than examine and generalize the entire founding's view on constitutionalism (to the extent that a uniform view can be discovered), this dissertation examines the most succinct, most coherent, and indeed the best account of American constitutionalism: *The Federalist*.[12] To that extent, this dissertation has two dimensions: it is both an investigation into constitutionalism as such and an exposition of *The Federalist*. The twin questions of this dissertation are: In *The Federalist*'s view, what is a constitution and why have one?

Preliminarily, it might be asked whether *The Federalist* has much to teach us about constitutionalism generally. There are two reasons to think that it does not. First, *The Federalist* is not a work of theoretical constitutionalism. Its primary and overt goal is to

12. For a praiseworthy retrospective on a career teaching *The Federalist* as well as its proper place in American civic education, *see* Sanford Levinson, *Constructing a Modern Canon for* The Federalist, 1 J. AM. CON. HIST. 313 (2023).

explain and defend a particular constitution—the Constitution of 1787, drafted by the Convention in Philadelphia—and it makes no effort to promote any other constitution. For that reason, it makes no explicit argument in favor of constitutions *generally* as a desirable way to arrange government. That lacuna may exist because Americans at the time simply presumed that America would have a constitution. A non-constitutional arrangement was simply out of the question. All the states had political arrangements called "constitutions," so why wouldn't the new national government? The primary question confronting the people of America, then, was what type of constitution America would have and what its features would be. If *The Federalist* primarily addresses the features of a particular constitution and fails to squarely address constitutionalism as a doctrine, what can it really teach us about constitutionalism?

Second, many scholars have worried that *The Federalist* lacks internal coherence.[13] It was drafted by three hands nearly simultaneously, and it is hard to imagine that the authors were reviewing each other's work during the flurry of writing. This fact in part led Douglass Adair—a titan of *Federalist* scholarship—to declare that below the surface of the work is "truly a split personality."[14] According to those following in Adair's footsteps on this point, so severe is the split personality that it led to incoherent account

13. *See, e.g.*, Richard A. Epstein, The Federalist Papers*: From Practical Politics to High Principle*, 16 HARV. J. LAW & PUB. POL'Y 13 (1993) ("I doubt that our three authors … ever had time to reflect on the overarching task facing Publius. … *The Federalist Papers* have been transformed into a detached philosophical examination that transcends Publius' initial partisanship and that conceals all signs of the chaos of their creation.").

14. Douglass Adair, *The Authorship of the Disputed Federalist Papers: Part II*, 1 WM. & MARY Q. 235, 242 (1944). At least two other prominent scholars latched onto Adair's characterization. *See* Alpheus Thomas Mason, *The Federalist—A Split Personality*, 57 AM. HIST. R. 625 (1952); GOTTFRIED DIETZE, *THE FEDERALIST:* A CLASSIC ON FEDERALISM AND FREE GOVERNMENT, 19-21 (1960). For an argument rejecting the split personality thesis, *see* George W. Carey, *Publius: A Split Personality?*, 46 R. POL. 5 (1984);

of such central topics as federalism and the separation of powers. If it is indeed the case that *The Federalist*'s account of such important foreground topics does not hang together, why should the same not also be true of its account of a background topic, like constitutionalism? On this view, even if *The Federalist* addresses constitutionalism, it might not provide us a coherent account, much less an interesting or persuasive one.

For each of these concerns there are responses sufficient to recommend continuing this study. In the first place, it is indisputable that *The Federalist*'s primary occupation is the defense and promotion of a particular constitution, not constitutionalism generally. But readers should take note that Publius emphasizes from the outset the novelty[15] of the enterprise, one which aims to "establish[] good government from reflection and choice."[16] The alternative is to "depend on … accident and force" for one's "political constitution[]."[17] Though a political constitution of the latter sort could result in good government, it is unlikely to happen that way ("accident") and there is a risk that this good government may only be achieved through injustice ("force"). Establishing government through reflection and choice is novel because it has not been tried. But, according to Publius, such intentional governmental design represents the best hope of good government for mankind. It would be odd if *The Federalist,* with its eye to posterity, included no explanation of the intentional establishment of good government as an abstract concept whatsoever; although the proof of concept would take the form of the

15. We more thoroughly review constitutionalism's novelty in Chapter 4.

16. THE FEDERALIST NO. 1, at 3 (James Madison) (Jacob E. Cooke ed., 1961). Hereinafter, all citations to *The Federalist* will simply state "Fed. No.," followed by the numeral of the paper and the page number in the Cooke edition. All references are to the Cooke edition.

17. Fed. No. 1, p. 3.

success of a *particular* constitution—that is to say, a particular arrangement designed through reflection and chosen by the people—the wholesale absence of a theoretical account would sit uncomfortably with the rest of the work.

What's more, a significant portion of *Federalist* scholarship investigates themes or principles that are understated in the work. One prominent example is David Epstein's *The Political Theory of* The Federalist, which seeks to explain Publius' resolute commitment to republicanism.[18] One could level a critique similar to the one above against Epstein's entire project: Why is a study of Publius' republicanism necessary given that, for Publius and his fellow citizens, there was a broad consensus around republicanism? Publius admits as much when he argues a non-republican government would be intolerable to "the genius of the people of America."[19] Epstein's contribution is to notice that although republicanism may have been a practical given, Publius nevertheless makes a careful argument for it. This dissertation proceeds in that mode, but considers the argument for constitutionalism.

The second concern—about the internal coherence of the work—should not deter us either. That it is possible *The Federalist* lacks a coherent account of constitutionalism is no reason not to ask the question. Even a fractured or inconsistent account of constitutionalism might teach us something; it may even corroborate the more contemporaneous critiques of constitutionalism. There is also reason to think that internal contradictions in *The Federalist* have been exaggerated by the scholarship. One recent

18. *See generally* DAVID F. EPSTEIN, THE POLITICAL THEORY OF *THE FEDERALIST* (1984); *see also* George W. Carey, *Republicanism and* The Federalist, 19 POL. SCI. REVIEWER 107 (1990).

19. Fed. No. 39, p. 250.

language-detection study of disputed essays has proven to be inconclusive; that is, even highly sophisticated software cannot tell much difference between Hamilton and Madison.[20] That remarkable fact suggests that *The Federalist* is entitled, like all great works, to a charitable reading and a rebuttable presumption of coherence.

What, then, is *The Federalist*'s theory of constitutionalism? Although Publius nowhere uses the word "constitutionalism," he does make use of the word "constitution" quite often, and not only to refer the Constitution proposed for ratification by the American people. Publius' constitutionalism has two dimensions—the first is an understanding of what sort of political system counts as a constitution, and the second is what benefits and promises the constitutional form of government offers. In other words, Publius' commitment to constitutions (which I call his "constitutionalism") has descriptive and normative components.

Regarding the descriptive component, I hasten to note at the outset that "constitutionalism" here is not about what earlier thinkers, such as Plato, meant by the term *politeia* ("regime" or "constitution"). For classical thinkers, the constitution was not a primarily legal term; it denoted, generally speaking, the entire arrangement of a political community and incorporated elements that modern thinkers now associate with economics and culture, not just politics and law. But according to *The Federalist*, a constitution deserving of the name is a decidedly legal arrangement that emphasizes

20. Jeff Collins, David Kaufer, Pantelis Vlachos, Brian Butler & Suguru Ishizaki, *Detecting Collaborations in Text: Comparing the Authors' Rhetorical Language Choices in the Federalist Papers*, 38 COMPUTERS & THE HUMANITIES, 15, 17 (2004) ("Based upon our findings, we argue that the nature of the collaboration between the two authors simply does not allow for clear separation."); *see also* EPSTEIN, *supra* note 18, at 2 (noting that the "reports of inconsistency" between Madison and Hamilton have been "greatly exaggerated").

certain limitations on the government. A constitution limits government action by combining three types of limitations. These three limitations are elaborated below and at length in Chapter 3. Here I briefly summarize each. The first limitation requires that the regime arise at a fixed point in time, and no political authority vested prior to that point in time remains valid after that point in time. I refer to this limitation as "founding." The second limitation prohibits officers or any other individuals subject to the regime from claiming political authority outside the established legal system. For example, mobs are not considered valid exercises of political authority. I call this limitation "horizontal monism." The third limitation divides the legal system into two levels—a higher law and a lower law. Because ordinary law is lower than higher law, it must be authorized by and operate within higher law. I call this limitation "vertical dualism."

That provides a definition of constitutionalism. But what is a constitution for? What task does it accomplish or what problem does it solve? Why limit government in the first place? This dissertation advances the view that that *The Federalist* champions constitutionalism as a tonic to popular rule.

According to Publius, America deserves—and would expect nothing less than—a strictly republican regime. Republicanism is understood to be a species of popular rule and is to be distinguished from democracy, which is also a species of popular rule. But *The Federalist* takes the position, in line with many ancient commentators, that popular rule must be saved from itself. When the people are the source and instrument of all power, they are liable to wield power in harmful and damaging ways. As William Allen put it, the challenge for Publius is "to demonstrate that a free people, even if imperfect,

can indeed make a free government."[21] The greatest injury the people can inflict on the body politic—and thus the greatest risk to popular rule—is what Publius identifies as *judging in one's own cause*. This phrase dates back to the classical Roman law maxim *nemo iudex in causa sua* ("no one should judge in his own cause"), so the challenge it presents to popular rule is referred to here as "the *nemo iudex* problem." When officers or individuals in a popular regime use public institutions to advance their own private ends, whether those ends regard material interests or opinions, they harm the body politic and corrupt it. They prevent government institutions from pursuing the common good, which for Publius is the end of all government and especially popular government.

I argue that the text of *The Federalist* betrays a preoccupation bordering on obsession with the *nemo iudex* problem and the history of attempts to solve it in the republican context. *The Federalist* makes a subtle yet sustained case that a new mode of government is required to successfully implement republicanism, lest the republican regime succumb to the *nemo iudex* problem. That new mode of government is constitutionalism.

Constitutionalism solves—or, to be more precise, represses—the *nemo iudex* problem so that republican government becomes viable. Founding and horizontal monism subject political authority to law. Founding focuses our attention on a single moment in time when all political authority was conferred. Because no preexisting political authority survived the founding moment, any claim to such authority is illegitimate.[22] Horizontal monism does something similar. It says that the legal system

21. William B. Allen, *The Constitutionalism of "The Federalist Papers"*, 19 POL. SCI. REVIEWER 145, 175 (1990).

22. Publius' commitment to the doctrine of founding thus has implications for how we

established at the founding is the only valid method of exercising political authority. Officers and individuals claiming the mantle of political authority must also claim the mantle of law. Vertical dualism entrenches and stabilizes certain political choices through higher law; ordinary government officers are beholden to those choices when they make and enforce inferior law, leaving them less discretion to manipulate the law in self-serving ways. The dissertation advances an interpretation of *The Federalist* according to which constitutionalism is a tripod; constitutions cannot exist without all three constitutive features. And so without a constitution a republican form of government is doomed to succumb to the *nemo iudex* problem.

Before turning to a brief outline of the chapters to come, a word is in order about methodology. The vast majority of scholarship on *The Federalist* has emphasized historical facts that would not have been known to an ordinary reader who was contemplating ratification. A relatively recent book-length project, for example, devotes over half of its pages to authorship, drafting, and publication.[23] And because the eighty-five essays in *The Federalist* were drafted by James Madison, Alexander Hamilton, and John Jay nearly simultaneously, a considerable portion of *Federalist* scholarship emphasizes or frames its interpretation around the named author of the papers. One of the most celebrated articles of the last century primarily regards the question of authority of some disputed essays.[24]

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understand the federal structure, for it suggests that the authority of states under the ratified Constitution is derivative of the founding moment itself and is not a continuation of state or colonial authority prior to the Revolution or ratification. I discuss this point in detail in Chapter 4.

23. MICHAEL I. MEYERSON, LIBERTY'S BLUEPRINT: HOW MADISON AND HAMILTON WROTE THE FEDERALIST PAPERS, DEFINED THE CONSTITUTION, AND MADE DEMOCRACY SAFE FOR THE WORLD, 9-132 (2009).

24. Douglass Adair, *The Authorship of the Disputed Federalist Papers*, 1 WM. & MARY Q. 92

And a considerable amount of scholarship seeks to put the identity of each essay's author into conversation with statements made by (especially) Madison or Hamilton at Philadelphia or after ratification, when they were officers in the early American government.[25]

The advantages of this "historical approach" are considerable.[26] Tracing *The Federalist*'s ideas to their sources—and seeing how ideas were used by its authors after ratification in the new American republic—are plainly of value. That purpose is furthered by unmasking Publius and emphasizing that the primary authors were Hamilton and Madison, undisputed luminaries of the founding generation. Moreover, it assists scholars that seek to situate *The Federalist* in the context of the ratification debates. For these reasons, a comprehensive reading of *The Federalist* certainly cannot ignore the history and the questions raised by the identities of the work's authors.

At the same time, overemphasizing the authorial and historical background of *The Federalist* creates the reverse problem: When we first approach a work with externally

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(1944).

25. For a recent example, see John Ferejohn & Roderick Hills, *Publius' Political Science*, in THE CAMBRIDGE COMPANION TO THE FEDERALIST 515 (Colleen A. Sheehan & Jack N. Rakove eds. 2020); Quentin Taylor, *The Mask of Publius: Alexander Hamilton and the Politics of Expediency*, 5 Am. Pol. Thought 55 (2016); ALBERT FURTWANGLER, THE AUTHORITY OF PUBLIUS: A READING OF THE FEDERALIST PAPERS (1984); MORTON WHITE, PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION (1987); COLLEEN A. SHEEHAN, JAMES MADISON AND THE SPIRIT OF REPUBLICAN SELF-GOVERNMENT (2009). Garry Wills goes so far as to state that Publius is so schizophrenic that there are in fact "five Publii": Jay, the Madisonian Madison, the Hamiltonian Madison, the Madisonian Hamilton, and the Hamiltonian Hamilton. *See* GARRY WILLS, EXPLAINING AMERICA: THE FEDERALIST 78 (1981).

26. I call this approach a "historical approach" not because my own reading will be ahistorical. Rather, I call this approach historical because it begins with certain historical facts (such as the identities of the authors) that not only cannot be discerned from the text itself but also were affirmatively obscured by the authors.

discovered historical facts in hand, we risk denying the text the opportunity to speak for itself and on its own terms. *The Federalist* was intentionally written pseudonymously. The chosen *nom de plume*—"Publius"—was evidently selected to comport with a popular genre of newspaper writing at the time, and it is improbable that the veil of pseudonymity did not affect the final product.[27]

Consider Number 54, which is one of the few essays to take up in any detail the question of slavery. Scholars largely agree that Number 54 was written by Madison. Madison was of course a slaveholder,[28] so it might be thought that Madison's personal interests contributed to the argument presented in that essay on behalf of the Three-Fifths Clause. But focusing too much on Madison's likely authorship causes us to lose sight of what is perhaps most interesting about Number 54: The argument on behalf of the Three-Fifths Clause is not stated in Publius' name but is instead ventriloquized through the mouth of "one of our southern brethren."[29] Publius could not present this argument even in his own name, which was itself a pseudonym. Though the rhetorical posture of *The Federalist* required Publius to make the best case on behalf of every clause of the Constitution, he could not in good conscience advocate to New Yorkers for an institution many viewed as a atrocious and cutting against New York's own interests. Doing so

27. The Anti-Federalists wrote under various pseudonyms, such as Agrippa, Brutus, Cato, Centinel, and the Federal Farmer. *See generally*, HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR: THE POLITICAL THOUGHT OF THE OPPONENTS OF THE CONSTITUTION (1981); Murray Dry, *Anti-Federalists in* The Federalist*: A Founding Dialogue on the Constitution, Republican Government, and Federalism*, in SAVING THE REVOLUTION: THE FEDERALIST PAPERS AND THE AMERICAN FOUNDING (Charles R. Kesler, ed.) (1987).

28. *See infra* Chapter 5, note 156.

29. Fed. No. 54, p. 367.

would have made Publius a partisan of the South, not a loyal citizen of New York, and thus raise suspicions about who held the pen of Publius. And if New Yorkers reading *The Federalist* believed that the author was not putting New York's interests first, it could undermine the persuasiveness of the entire series of essays. It would powerfully undercut Publius' promise in Number 1 to "frankly acknowledge to [readers] [his] convictions" and "freely lay before [readers] [his] reasons on which they are founded."[30]

Or consider that it would have been obvious to a reader that Numbers 9 and 10 make a pair, for they make arguments for the same conclusion. Today, however, the two essays are rarely put into conversation,[31] evidently because Hamilton authored Number 9 and Madison Number 10. Voluminous *Federalist* scholarship emphasizing the authorship of specific papers or otherwise providing a "historical" reading of the work, while undoubtedly valuable, may be missing some of the work's most interesting couplets. That is because while *The Federalist* was written by three hands, it was certainly intended to be read as if it were written by one.[32] Reading the work as it was intended to

30. Fed. No. 1, p. 6.

31. Morton White, George Carey, and Ralph Ketcham, however, provide notable exceptions. See WHITE, *supra* Introduction, note 25, at 155; GEORGE W. CAREY, THE FEDERALIST: DESIGN FOR A CONSTITUTIONAL REPUBLIC 6-18 (1989); Ralph L. Ketcham, *Notes on James Madison's Sources for the Tenth Federalist Paper*, 1 MIDWEST J. POL. SCI. 20, 21 (1957).

32. Adair hypothesizes that by the time the Constitution was ratified, no more than a dozen or so individuals knew the identity of Publius. *See* Adair, *supra* Introduction, note 14, at 238. But even after the French edition of 1792 that listed Hamilton, Madison, and Jay as authors, the three men kept it a closely guarded secret who authored each essay. Dramatically, their conspiracy of silence was broken only two days before Hamilton's famous duel with Aaron Burr, when Hamilton slipped a list into a book at the law offices of an old friend. That list has become the starting place for scholars seeking to determine the authorship of each essay, but the original copy has been lost. *See* MEYERSON, *supra* Introduction, note 23, at 4.

be read requires, therefore, putting the text and its interlocutors at the center as well as deemphasizing the authorship, the debates at Philadelphia, and subsequent events.

For these reasons, this dissertation aims to read *The Federalist* naïvely.[33] For this particular project, reading naïvely means approaching the work primarily as it was meant to be read. Accordingly, the dissertation focuses on the text of *The Federalist*, with limited reference to Madison, Hamilton, or Jay's authorship or their other work. Likewise, the dissertation begins with the presumption that *The Federalist* presents a coherent and comprehensive argument in favor of ratification, one that is supported by a consistent political theory. Some scholarship has sought to understand Publius in this vein, but mostly does so implicitly,[34] inconsistently,[35] or only regarding a single topic.[36] This dissertation undertakes a naïve reading of *The Federalist* as intentional, consistent, and wide-ranging.

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33. See RALPH LERNER, NAÏVE READINGS: REVEILLES POLITICAL AND PHILOSOPHIC (2016). The premise of Lerner's book is that there is much to be learned from reading difficult works "naïvely," by which he means "not giving short shrift to the obvious." *Id*. at 2. For this reason, "attention to [the] surface may be especially rewarding." *Id*. Certainly it would have appeared obvious to the most immediate audience of *The Federalist*—readers in New York contemplating ratification—that the series was written by the same hand.

34. See, e.g., Dissertation, Shanaysha M. Furlow Sauls, *The Concept of Instability and the Theory of Democracy in The Federalist* (2008) (on file with the author).

35. Epstein notes in his introduction that "reports of inconsistency [between the authors] have been greatly exaggerated." EPSTEIN, *supra* Introduction, note 18, at 2. Yet he acknowledges that some differences do arise and are noteworthy. Hence, though his reading of *The Federalist* aims at providing a coherent account, Epstein routinely relies on Hamilton and Madison as the main protagonists.

36. Harvey Mansfield remarks that "we learn the full wisdom of The Federalist from its formal author, Publius, with Hamilton and Madison speaking together in one voice." Harvey Mansfield, *The Republican Form of Government in* The Federalist, THE CAMBRIDGE COMPANION TO THE FEDERALIST 558-59 (Colleen A. Sheehan & Jack N. Rakove eds. 2020). The main subjects of Mansfield's excellent essay are republicanism and Publius' political science in contradistinction to contemporary political science.

This dissertation proceeds in five chapters. Chapter 1 concerns Publius' demand for a strictly republican regime. In part, the republican character of the American regime is to be expected; the American people would accept nothing less. But Publius presents an argument for republicanism, and that argument will be foundational for the remainder of the dissertation. In particular, the chapter pays attention to several different definitions of republicanism presented in *The Federalist* and advances the proposition that the definition provided in Number 39 is the final or most comprehensive teaching on republicanism. According to Number 39, an institution is republican if the institution's officers "derive" their power from the people and the officers serve at the pleasure of the people, for a limited term of office, or so long as they do not commit malfeasance.[37] In simple terms, an office is republican if the officer appointed to it is selected directly or indirectly by the people and if his continued occupation of the office turns, in some form or other, on the people's consent. The chapter then turns to the justification for *strict* republicanism, the notion that every institution of government must be republican. I argue that Publius provides three independent reasons why the government must be strictly republican. First, any view of human nature committed to human freedom must make an "honorable determination" that man has the capacity to engage in self-rule; second, the "fundamental principles of the Revolution," which is to say modern politics, point toward republicanism as the forefront of innovation in government; and third, the "genius" of the people of America would tolerate nothing less than a strictly republican regime.[38]

37. Fed. No. 39, p. 251.

38. *Id*. at 250.

Building on Chapter 1's broad survey of Publius' theory of republicanism, Chapter 2 takes up Publius' critique of popular rule. The critique takes the form of an argument against democracy, which is to say an argument against direct rule by the people. The problem of democracy is that each decision made by the people is simultaneously a public and a private one. The people are unable to reason clearly about the public interest because every determination is clouded by private considerations; assemblies do not help. This is to say that the problem of democracy is the *nemo iudex* problem. This chapter argues, however, that the *nemo iudex* problem infects all popular forms of government, including republics. In fact, it is the *nemo iudex* problem that underpins Publius' famous argument about faction in Number 10. The chapter then proceeds to show how Publius rejects several governmental structures that have been thought by others to protect republicanism against the ills of the *nemo iudex* problem. In particular, Publius rejects simple representation, the mixed regime, the separation of powers, a confederacy of republics, and the extended republic as full and comprehensive solutions to the *nemo iudex* problem. Although Publius endorses some of these structures—representation, separation of powers, and the extended republic—he does not conclude that any of them alone can make republicanism stable and protect it.

By the end of Chapter 2, we are left with a dilemma. On the one hand, the Americans' new government must not only be republican, it must be *strictly* republican. On the other hand, every governmental structure by which human beings have attempted to put republican government into effect has succumbed to the disease of the *nemo iudex* problem. Is there a way out?

Chapter 3 defines and explores Publius' view of constitutionalism. For Publius, although every political regime is constituted, not every political regime has a

constitution. Constitutionalism rests on three legs, like a tripod. Founding is the principle that political authority comes into being at a fixed point in time. Claims to political authority that trace to moments in time prior to the founding are illegitimate. Accordingly, no exercise of political authority is valid or legitimate unless it purports to trace that authority to the founding moment. Founding thus concerns the establishment of authority, not its organization. Horizontal monism functions similarly to founding. The critical difference is that whereas founding has a *temporal* character—it requires tracing authority to a moment in time—horizontal monism requires tracing political authority to the legal system. The third (and most familiar) leg of constitutionalism is vertical dualism. Closely associated with the work of Bruce Ackerman,[39] vertical dualism maintains that political decisions can be made on one of two "tracks" of lawmaking: a superior law and an inferior law. Superior law (otherwise called "higher" law or "constitutional" law) authorizes and constrains inferior law (otherwise called "lower" law or "statutory" law). Vertical dualism effects in the republican context a separation between a law "established by the people, and unalterable by the government" and a law "established by the government, and alterable by the government."[40] It brings the government beneath the demands of a law traceable to the founding. Chapter 3 concludes by explaining how each of these three features of constitutionalism interlock with and reinforce one another.

Having established Publius' understanding of constitutionalism, Chapter 4 explains its promise. For starters, constitutionalism must be understood to be a novel

39. *See infra* Chapter 3, note 108 and accompanying text.
40. Fed. No. 53, p. 360.

form of rule from Publius' vantage point. It is not coterminous with any of the forms of rule discussed and rejected in Chapter 2: simple representation, the mixed regime, the separation of powers, a confederacy of republics, or the extended republic. Because it is new, its promise a new solution to republicanism's instability and so one worth considering. Moreover, while constitutionalism is not coterminous with republicanism, the two concepts mutually reinforce each other. Republicanism generally and strict republicanism especially take the origin and boundaries of power to be central concerns of the regime; that is why officers of government must always be ultimately removable by the people. Constitutionalism purports to supply a framework for enforcing such limitations.

So how does constitutionalism solve the *nemo iudex* problem? At the ordinary level, the solution arises in large part by the application of higher law to the creation, execution, and application of inferior law. When a desired policy offends higher law, officers are not free to pursue it; founding and horizontal monism cut off that possibility. What about higher lawmaking? Cannot the *nemo iudex* problem influence that? The answer is of course it can, but vertical dualism in a republican context requires supermajorities. Ordinary law is made by simple majorities, and higher law is made by supermajorities—that is precisely what gives higher law its higher character. To make law through supermajorities means that private concerns are less likely (even in a small republic) to become higher law.

The chapter concludes by raising two puzzles posed by these answers. First, if constitutionalism in the republican context turns on the ability to collect a supermajority vote to make higher law, then why not create a system with *several* levels of lawmaking, each distinguished by the size of the majority by which it was enacted? Publius rejects

this "sliding scale" theory of constitutionalism because it conflicts with core principles of republicanism. Second, if decisions made by ever larger supermajorities are more likely to aim at the public good, why not have a unanimity requirement to make higher law? Publius rejects this as providing a veto to minorities of one, which obstructs the common good. With the answer to this second puzzle in mind, constitutionalism appears as a kind of experiment in supermajorities: Which supermajority requirement should we embrace to balance the need for public-spirited decisions over and against the harm of private vetoes? Only an experiment in self-government can provide evidence.

Chapter 5 takes up the important questions of enforcement of the constitution and constitutionalism's limits. Two possibilities arise as candidates for constitutional enforcers: the people and judges. This chapter presents an argument that, notwithstanding several passages in *The Federalist* that can be read to support constitutional enforcement by the people, Publius roundly rejects the possibility of public enforcement in Numbers 49 and 50. There, he says that enforcement by the people will fatally succumb to the *nemo iudex* problem. The passages in support of popular enforcement are better read as discourses on the people's right to revolution, which is not in any way contradictory to constitutionalism. That leaves judges. Like many of his contemporaries, Publius endorses a vision of separated powers that divides between legislative and executive authority. But he also helped to develop a theory of an independent judiciary as a part of the doctrine of separation of powers. The judiciary must be independent, otherwise its characteristic power—to interpret and declare the meaning of the law—would be nugatory. Constitutionalism requires judicial review. Finally, the chapter concludes by pointing out three limitations that Publius places on constitutionalism: affirmatively harmful provisions, which might compromise the

regime's public character or the ability of the community to function; indeterminate provisions, which are not readily susceptible to judicial determination and so undermine the constraining function of constitutionalism; and the possibility that judges, charged with enforcing the constitution, might themselves judge in their own cause. Chapter 5 also provides some concluding thoughts.

Publius' answer to the question with which we began, then, is that constitutionalism is not at all opposed to popular rule. Although contemporary critics of constitutionalism generally maintain that constitutionalism constrains majorities, Publius' position is that, on the contrary, constitutionalism enables majorities to rule with stability. For Publius at least, popular rule is constantly under threat of a fatal disease: Public powers vested in the name of the people can be wielded with an eye to private considerations, private interests, and private passions. Constitutionalism aims to prevent such misgovernment and channel public decisions toward the common good. If the people are truly the "only legitimate fountain of power,"[41] then power must be exercised not only in their name but also for their benefit. Constitutionalism promises to enable and stabilize popular rule, not undercut it.

41. Fed. No. 49, p. 339.

CHAPTER 1: WHY REPUBLICANISM?

The Federalist's arguments in favor of federalism, the separation of powers, and the large republic are discussed at length in the work and therefore are easy to detect. But one of Publius' most important claims—that the new national government be a "strictly," "wholly," and "purely" republican government[1]—receives comparatively little attention. This is a doubly surprising fact. In the first place, republicanism is the theory on which numerous features of the Constitution of 1787, such as the separation of powers, are based. A more elaborate exploration of republicanism therefore might be expected in order to ground those features. Moreover, Publius suggests that an entirely republican government is a novelty in the history of politics,[2] and we therefore might expect a more substantial explanation or justification of complete republicanism. This asymmetry—that republicanism is one of the Constitution's chief innovations yet recedes into the background in *The Federalist*—has puzzled scholars, so much that some books have been dedicated to solving the riddle.[3]

This chapter likewise takes up the question of Publius' demand for a strictly republican government. Here, however, the primary concern is to understand the demand for strict republicanism in the national government as one half of the tension that constitutionalism attempts to solve. That is, on the one hand, even a partially non-republican federal government cannot be tolerated (Chapter 1); on the other hand,

1. Fed. No. 39, p. 250 ("strictly republican"); Fed. No. 73, p. 497 ("wholly and purely" republican).

2. Fed. No. 14, p. 84.

3. *See, e.g.*, EPSTEIN, *supra* Introduction, note 18.

popular governments are beset by intractable problems, and earlier attempts to solve these problems have failed (Chapter 2).

The chapter proceeds by explaining the metes and bounds of Publian republicanism. What is republicanism and how is its definition justified? On what basis can Publius claim that the government instituted by the Constitution of 1787 is, in point of fact, not merely "republican" but rather "strictly republican"? The chapter then turns to the justifications for strict republicanism. Why might it be said that only a strictly republican government is defensible? In attempting to answer this question, the chapter takes seriously a passage from Number 39 in which Publius rests strict republicanism on three apparently distinct grounds: "[N]o other form [of government] would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government."[4] The chapter takes up each of these justifications for republican government (working in reverse order), identifying them with Publius' view of human nature, the principles of the Revolution and modern politics, and the unique character of the American people.

REPUBLICANISM

In Number 39, Publius provides a clear and apparently decisive definition of republicanism. Republics must "derive" their power from the people, and officers in republics must serve only "during pleasure, for a limited period, or during good

4. Fed. No. 39, p. 250.

behaviour."[5] By providing specific criteria for republicanism here, it may seem that the definition provided is a decisive definition of republicanism and requires no further explanation. Yet, at the outset, there are threshold reasons to doubt the superiority of the definition provided in Number 39, and these reasons must be addressed before a comprehensive account of republicanism can be given.

In the first place, the definition of republicanism in Number 39 is just that—a definition.[6] Publius writes there that "we *may define* a republic to be, or at least may bestow that name upon" governments with certain qualities. Publius does not say flatly that such governments are republics, nor does he seek to provide a natural typology of regimes among which republics are just one type. The locution here, on the contrary, suggests that there may be some forms of government which are in fact republican but upon which we may not "bestow" the name of republic. Such a remark deserves some explanation, for it undermines the claim that the definition in Number 39 is Publius' authoritative view on republicanism.

Moreover, Publius uses the term "republic" throughout *The Federalist* in ways that conflict with the definition in Number 39. In discussing the Senate, Publius deems Sparta, Rome, and Carthage to be republics; he even distinguishes these regimes as the only "long lived republic[s]" in the history of mankind.[7] Yet he immediately remarks that Sparta and Rome each had a "senate for life," and the Carthaginian senate contained a

5. Fed. No. 39, p. 251.

6. George Carey explains that the definition is a "stipulative" one, beset by qualifications. George W. Carey, *Republicanism and* The Federalist, 19 POL. SCI. REVIEWER 107, 108 (1990).

7. Fed. No. 63, p. 426. *See also* Fed. No. 6, p. 32 ("Sparta, Athens, Rome, and Carthage were all Republics").

council that was "appointed not only for life, but filled up vacancies itself."[8] Each of these institutions would violate the requirement in Number 39 that officers serve *at most* during the pleasure of the people or while exhibiting good behavior. To be sure, the definition provided in Number 39 seems designed to prohibit officeholders from serving for life as of right, even if they initially derive their power from the people.

On these two grounds, Publius' understanding of republicanism might be thought to admit of some dispute. How definitive can the definition from Number 39 be if it is provided half-heartedly and deployed inconsistently?

Paul Peterson has provided an attractive, if incomplete, solution to the difficulty, thereby preserving the definition in Number 39 as Publius' authoritative teaching on republicanism. According to Peterson, when Publius uses "republic" in a way that diverges from the definition in Number 39, he is either referencing the common philosophical understanding of republicanism or else employing the Anti-Federalists' understanding of republicanism.[9] Had Publius avoided using the term "republic" in these ways, the debate over ratification might have needlessly digressed into a quarrel over semantics. With that in mind, Peterson contends that there are three main usages of "republic" in *The Federalist*.

The first of these usages derives from the European philosophical tradition. A simplification (perhaps an oversimplification) of this view may be found in the very first line of Machiavelli's *Prince*: "All states, all dominions that have held and do hold empire

8. Fed. No. 63, p. 426.

9. Paul Peterson, *The Meaning of Republicanism in* The Federalist, 9 PUBLIUS 43, 44 (1979).

over men have been and are either republics or principalities."[10] For Machiavelli, republics are primarily understood as distinct from monarchies, whether lawful or tyrannical. Peterson's preferred example of the philosophical view of republicanism comes from Montesquieu, who claims that a republic arises when "the body [of the people] or only a part of the people is possessed of the supreme power."[11] Like Machiavelli, Montesquieu explicitly opposes republics to monarchical rule, although he divides monarchical rule into true monarchy and despotism. Thus, even an aristocracy—that is, a regime in which the supreme power is "lodged in the hands of a part of a people"—is a republic for Machiavelli and Montesquieu.[12] Publius himself echoes the republic-monarchy dichotomy in the final paragraph of *The Federalist*, citing Hume to the effect that it is difficult "[t]o balance a large state or society … whether monarchical or republican, on general laws."[13] It should also be remarked that this philosophical usage of the term "republic" is the broadest, bringing the largest number of regimes within its scope; only monarchies are excluded.[14] And it is according to this usage that Publius can

10. NICCOLÒ MACHIAVELLI, THE PRINCE, at 5 (tr. Harvey Mansfield 2d ed. 1998).

11. Peterson, *supra* Chapter 1, note 9, at 47; MONTESQUIEU, THE SPIRIT OF THE LAWS, II.1, in 1 THE COMPLETE WORKS OF M. DE MONTESQUIEU (1777), available at https://oll.libertyfund.org/title/montesquieu-complete-works-vol-1-the-spirit-of-laws#lf0171-01_head_005. The second half of *The Spirit of the Laws* may be found at BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS, in 2 THE COMPLETE WORKS OF M. DE MONTESQUIEU (1777), available at https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/838/0171-02_Bk.pdf. Hereinafter, Montesquieu's *Spirit of the Laws* will be cited to as "MONTESQUIEU, SPIRIT OF THE LAWS" along with the book number (in Roman numerals) and chapter number (in Arabic numerals) and without respect to the book's place in the first or second volume of the Complete Works.

12. MONTESQUIEU, SPIRIT OF THE LAWS, II.1.

13. Fed. No. 85, p. 594 (citing Hume's Essays).

14 In this sense, the philosophical view of republicanism most surely derives from the ancient Roman hatred for kings. Only after deposing Lucius Tarquinius Superbus—the

claim that even states with hereditary officials, such as Sparta or Britain, fall within the republican category—even if he denies them that appellation in the final analysis.

The second usage Peterson identifies is the Anti-Federalists' understanding of republicanism. Publius most clearly summarizes it in Number 37:

> The genius of republican liberty seems to demand on one side not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people by a short duration of their appointments; and that even during this short period the trust should be placed not in a few, but in a number of hands.[15]

This view narrows republicanism considerably from the philosophical view. Hereditary offices as well as institutions with a single officer are prohibited under this view of republicanism. Not only that, officeholders who serve for more than a "short duration" compromise a government's republican character. Accordingly, Sparta, Rome, Carthage, and Britain certainly could not be considered republics. Moreover, the Constitution of 1787 is not a republic under the Anti-Federalist definition, most clearly because Article III permits federal judges to continue in office during good behavior (and thus frequently until death),[16] but also on account of the four-year terms for presidents and six-year terms for senators, which could be considered longer than a "short duration." (Publius makes an able case in Numbers 52 and 53 that the two-year term for representatives likely comports with the Anti-Federalist understanding of republicanism.) That the Constitution of 1787 does not fall within the Anti-Federalist view of republicanism is

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last of the Roman kings—did the Roman state come to be known as the *res publica* ("public affair/matter"), from which our word "republic" derives.

15. Fed. No. 37, p. 234.

16. U.S. CONST. art. III, § 1.

grounds enough to assert that the understanding provided in Number 37 is not Publius' true view of republicanism. But Peterson points us to an additional clue that Number 37 is not Publius' genuine view: Publius says here that republicanism only "seems" to demand the stated characteristics.[17] Because republics only *appear* to have such characteristics, it remains open whether republics in fact share these characteristics and whether some other indicia of republicanism might exist.

According to Peterson, the third (and definitive) usage of "republic" arrives in Number 39. Republics are governments which (1) "derive[] all [their] powers directly or indirectly from the great body of the people," and (2) are "administered by persons holding their offices during pleasure, for a limited period, or during good behaviour."[18] This definition parallels the Anti-Federalist definition of republicanism in important ways, namely by dividing the question of republicanism into two subsidiary inquiries: (1) from where do officers derive their powers; and (2) for how long can officers exercise those powers? But Number 39's definition (i.e., Publius') differs from the Number 37 definition (i.e., the Anti-Federalists') in important ways.

Publius broadens what counts as a republic in at least two respects. First, he stretches the tenure that officers may serve. Whereas the Anti-Federalists deemed short terms of office necessary for the existence of a republic, Publius stipulates that short terms of office are merely sufficient to establish a regime's republican character. In addition to short-tenured officeholders, officers that serve during the pleasure of the people or during good behavior comply with the republican form. Second, Publius broadens the

17. Peterson, *supra* Chapter 1, note 9, at 46.

18. Fed. No. 39, p. 250.

Anti-Federalist definition by dispensing with the criterion that power should be placed in the hands of a single person. It should be said that the Anti-Federalist definition ("trust should be placed not in a few, but in a number of hands")[19] admits of some ambiguity—does it mean that every office must have multiple officers, or does it simply mean that the government must be made up of multiple offices? But the granularities of the Anti-Federalist proposition need not be determined right now. It is enough to point out that, for Publius, a government constituted by a single man, elected for life, and subject only to the restriction of good behavior, would be strictly republican. Such a regime would not be republican on the Anti-Federalist view, for it (among other reasons) violates the principle that power ought to be lodged in many hands.

The definition in Number 39 also clarifies features of republicanism that the Anti-Federalist view leaves murky. For example, according to the statement in Number 37, it is sufficient that the government's power be "derived from the people," but nothing more is said. Number 39, in contrast, states that the government's power must be derived from the "great body" of the people. Although it is hard to imagine any Anti-Federalist taking issue with this alteration, it does suggest on the surface that Publius is narrowing the definition of republicanism—he maintains that a government cannot be a republic if the people from whom it derives its powers is circumscribed beyond a certain degree. And in a final point of departure, Publius says in Number 39 that government power may be derived "directly or indirectly" from the people. It remains up for debate whether the Anti-Federalists can be said to have opposed indirect elections as such. In Number 68, Publius notes that the electoral college is the only part of the Constitution "of

19. Fed. No. 37, p. 234.

consequence" that has "escaped without severe censure." Even the sharpest Anti-Federalists, Publius says, admit that the electoral college is "well guarded."[20]

Peterson's argument that the definition provided in Number 39 is Publius' final word on the scope of republicanism—likely falling somewhere between the Anti-Federalist view, which is quite narrow, and the philosophical view, which is quite broad—receives some added support from the text of Number 39 itself. There, Publius laments how imprecisely the term "republic" is used in political literature. One cannot satisfactorily determine the scope of republicanism from "political writers" or the "constitution of different States."[21] Publius raises the examples of Holland, Venice, Poland, and England—each of which has frequently been monikered a "republic." Yet each of these are "nearly as dissimilar to each other as to a genuine republic," which displays the "extreme inaccuracy with which the term has been used in political disquisitions."[22] Before providing his own definition, Publius notes why these disquisitions have gone awry: They have sought to determine what a republic is from the "application of the term"—that is, by looking at the governments that are called republics. Thus England is called a republic because it has "one republican branch," the House of Commons. But England combines the Commons with "an hereditary aristocracy and monarchy" and thus cannot be in truth a republic. According to Publius,

20. Fed. No. 68, p. 457-58. Cooke adds that the reference is likely to the third Federal Farmer letter.

21. Fed. No. 39, p. 250.

22. Fed. No. 39, p. 250-251.

republicanism's scope cannot be determined by looking at how the term is used, but only by "recurring to principles."[23]

As helpful as Peterson's framework is for solving Publius' inconsistent usage of the term "republic," it surprisingly does not address a central remark about republicanism from Number 10. In that number, Publius famously argues that a large republic, which encompasses a vast array of interests, passions, and opinions, can ward off the vices of faction. And in making that argument, Publius defines a republic as "a government in which the scheme of representation takes place."[24] Because Publius' primary interest in Number 10 is to investigate how representation operates—not how republicanism per se operates—he says little about the basis for or the consequences of this definition. As a result, it is difficult to see from the text how this understanding of republicanism fits with any of the three other views that Peterson elucidates. Is republicanism-as-representation related to one of the three usages we have reviewed, or does it constitute an altogether different fourth understanding? And if the latter, which is Publius' true view of republicanism—Number 10 or Number 39?

I suggest that the representation dimension of republicanism raised in Number 10 is a rough restatement of Publius' definition of republicanism in Number 39. That is, the definitions provided in those essays are two sides of the same coin. In the first place, notice that conflating republicanism with representation does not fit comfortably with the philosophical view of republicanism, which conceives of a republic as a non-monarchy. Some regimes, such as a strict hereditary aristocracy, are republics on the

23. Fed. No. 39, p. 250.

24. Fed. No. 10, p. 62.

philosophical view but do not incorporate representation. Admittedly, one of the themes in Number 10 is the philosophical view of republicanism, especially Montesquieu's view that republics can only be successful on a small scale. And it would be odd for Publius, in the process of rejecting Montesquieu's view about the size of republics, to smuggle in a new definition of republicanism altogether. Yet it is difficult to see how republicanism-as-representation matches the philosophical view of republicanism as any regime that is not a monarchy. As we saw, Montesquieu concedes that hereditary aristocracies are republics (because they are not monarchies),[25] yet hereditary aristocrats do not "refine and enlarge" the views of the public, and thus do not participate in representation as Number 10 envisions.[26] Consequently, Number 10 disagrees with the philosophical view of republicanism about the republican character of at least some regimes.

Likewise, the definition from Number 10 does not match the Anti-Federalist view of republicanism. The essential features of the Anti-Federalist view are short terms of office and multiple officers. But from the little we learn about republicanism in Number 10 it would seem that a "scheme of representation" covers considerably more types of government. A regime administered by a single representative, appointed for life and selected by the people, might fit Number 10's definition as long as there was genuine representation taking place. So a government like that would not accord with the Anti-Federalist view.

Although it cannot be stated conclusively, the definition of republicanism provided in Number 10 is compatible with the definition provided in Number 39. First,

25. MONTESQUIEU, SPIRIT OF THE LAWS, II.1.

26. Fed. No. 10, p. 62.

Number 10 only requires representation, which is understood to be "the delegation of the Government … to a small number of citizens elected by the rest."[27] This would seem to map onto Number 39's requirement that the powers of government be derived directly or indirectly from the people. Second, Publius elsewhere indicates the existence of a relationship between representation and re-eligibility for office. Well-defined terms of office with the possibility of re-election provides the office holder "the inclination and the resolution to act his part well," while also giving to the electorate "time and leisure to observe the tendency of his measures, and thence to form an experimental estimate of their merits."[28] Representation would seem to suppose that retaining office is conditional in some form or fashion, so future service must be possible but not certain. This would seem to map, however roughly, onto Number 39's condition that officers serve for a defined period, during good behavior, or during pleasure—each of which conditions future service in office. In sum, the twin prongs of the definition from Number 39—deriving powers from the people as well as defined (if extremely long) terms of office—would seem to be a different way of stating the "scheme of representation" standard used in Number 39. Deriving power from the people and defined terms are, in tandem, designed to foster whatever benefits representation might provide.[29]

27. Fed. No. 10, p. 62.

28. Fed. No. 72, p. 487.

29. Publius' interest in representation in Number 10, as opposed to in Number 39, might arise on account of his interest in Number 10 in distinguishing republicanism from democracy. In the latter case, no representation takes place. We return to this point more fully in Chapter 2.

STRICT REPUBLICANISM

In addition to providing a theoretical account of republicanism, Publius endeavors to explain how the Constitution drafted by the Convention complies with that definition—in other words, to demonstrate that the Constitution is strictly republican. But before doing so, he reduces the definition of republicanism to two easy-to-apply guidelines. Each plays a role in determining whether a government complies with the republican form.

First, it is "essential" that the government's power be "derived from the great body of society, not from an inconsiderable portion, or of a favored class of it."[30] Otherwise, it may be the case that "a handful of tyrannical nobles" could form the foundation of the government and claim the "honorable title" of being republicans.[31] Publius does not specify how large the pool of people must be. He would likely concede that it need not be a majority of individuals, for, as he acknowledges in Number 54, slaves are people yet are excluded from the body politic. The same can be said for women and some free men, the latter having often been excluded on account of failing to meet property qualifications to vote. (It ought to be noted, however, that the ratification elections were atypically open: Many states, including New York, dropped property qualifications to vote for delegates to their ratification conventions, while others loosened similar qualifications in order to stand as a candidate for delegate.)[32] Here, at least, Publius seems interested in distancing republicanism from aristocracy. Consequently, the minimum number necessary to

30. Fed. No. 39, p. 251.

31. Fed. No. 39, p. 251.

32. *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 7 (2005).

constitute the "great body of the people" is certainly more than a few dozen individuals, although a number in the tens of thousands is more likely. What's more, Publius seems uninterested in determining precisely how large the "great body of the people" must be. Too high a number would call into question the republican character of the state governments—which would not win the cause of ratification any additional supporters. The risk to the republican character of the state governments is most clear when Publius says this element is "essential" to being a republic. What he means is that deriving powers from the "great body of the people" is a necessary condition of republicanism: If a government, such as that of a state, derives its powers from anything *less than* the threshold that constitutes the "great body of the people," then it is decidedly not a republic.

The second rule of thumb that Publius provides is a "sufficient" condition for a regime to be a republic. Thus, even if this condition is not satisfied, a government may nevertheless be deemed a republic. But other inquiries must be undertaken to prove the regime's republican character. Because this condition is a sufficient one, it proves more useful than the first rule of thumb—it tells us what *is* a republic, not what is not. The rule of thumb states that a government is a republic if (1) "the persons administering it be appointed, directly or indirectly, by the people"; and (2) such officers "hold their appointments by either of the tenures just specified."[33] The first requirement—appointment directly or indirectly by the people—restates the core definition of a republic: a republic is a government that "derives all its powers directly or indirectly from the great body of the people." Its significance lies in suggesting that if the people *appoint*

33. Fed. No. 53, p. 251.

an officer with specific powers, then such powers are considered to have been *derived* from the people. The second requirement of this rule of thumb, however, requires some dissecting. Recall that, in Number 39's statement of the definition of republic, *three* types of tenure were mentioned: offices held "during pleasure"; offices held "for a limited period"; and offices held "during good behavior." Yet in the rule-of-thumb portion of Number 39, Publius writes that that republicanism can be obtained when offices are held by "*either* of the tenures just specified"—suggesting that there are only two types of tenure.[34] Are there two types of republican tenure, or three?

The likely answer rests on the uncertain distinction between "pleasure" and "good behavior." The relationship between pleasure and good behavior is discussed most directly, though still quite obliquely, in Number 66. The immediate context there concerns objections to the Senate's power to impeach. One objection states that the Senate may have a conflict of interest when it tries the impeachment of a federal officer that the Senate had previously confirmed. That is, should the Senate confirm an officer who is subsequently impeached by the House of Representatives, then the Senate may choose not to convict the officer in the impeachment trial for the reason that conviction would reflect poorly on the Senate's earlier judgment of the officer's fitness for office. Publius attacks this objection on the grounds that it fundamentally undermines the basic notion of serving in office at the pleasure of another.

> The principle of this objection would condemn a practice, which is to be seen in all the State governments, if not in all the governments with which we are acquainted: I mean that of rendering those *who hold offices during pleasure*, dependent on the pleasure of those who appoint them. With equal plausibility might it be alleged in this case, that the favoritism of the latter

34. Fed. No. 39, p. 251 (emphasis added).

would always be an asylum for the misbehavior of the former.[35]

Publius continues on to argue that at-pleasure removal and impeachment are different in substance, and therefore the Senate will not be at risk of the conflict of interest. The difference, he says, lies in the following. In the at-pleasure scenario, appointment and removal are being made by the same person (typically a superior officer). But in the Senate-impeachment scenario, the Senate "merely sanction[s] the choice of the Executive" when it confirms a nominee; consequently, the Senate will not be biased if that nominee (now officer) is impeached.

Yet there are other reasons to think that the comparison between at-pleasure tenure and impeachment is not entirely inapt. In the first place, Publius qualifies his claim that the senators will not be biased, stating only that "in the main" they will be impartial in the case of an impeached officer. In fact, Publius notes that sometimes the "facts may not always correspond with the presumption" of impartiality—implying that corruption will infect impeachments, however rarely. Moreover, the discontinuity between at-pleasure tenure and impeachment arises from the appointment side of the equation: When the appointer and remover are the same, there will often be bias. But this supposes that the standard for removal is flexible and thus susceptible to bias; when standards for leaving office are clearer (for example, impeachments for treason), there is a slimmer risk of bias. That is, to the extent that "at pleasure" and "good behavior" are comparable, they are pliable standards and largely subject to the eye of the beholder. Were they not, the problem of bias would not be a problem in either case, but Publius concedes that both pose just such a problem.

35. Fed. No. 66, p. 449 (emphasis added).

This argument should not be taken to suggest that Publius understands there to be no difference whatsoever between an officer who serves at pleasure and an officer who can be impeached by the House and convicted by the Senate. That state of affairs would effectively override Article II, Section 4, which sets the standard of "Treason, Bribery, or other high Crimes and Misdemeanors" for presidents, vice-presidents, and other civil officers.[36] It would also override the impeachment limitation for federal judges—that they may continue in office during "good Behaviour."[37] None of these officers serve in office during the mere pleasure of anyone else. But Publius' admission that the Senate may, in some cases, be biased suggests that the good behavior standard is susceptible to the same subjective application to which pleasure is. What Publius appears to have in mind, therefore, when he says republican government arises when an officer serves for "either of the tenures just specified" is the following: (1) officers who serve in office for defined lengths of time and (2) officers who serve so long as their superior does not remove them, either on account of misfeasance (pleasure) or malfeasance (good behavior).[38]

36. U.S. CONST. art. II, § 4.

37. U.S. CONST. art. III, § 1. Note that federal judges are impeachable based on the clause in Article II, § 4, because federal judges are "civil Officers of the United States." Were they not, there would be no mechanism to enforce the "good Behaviour" standard to remove federal judges.

38. A question arises as to what Publius thinks about the "other high Crimes and Misdemeanors" standard. That is, would a government be republican if it had an officer elected by the people who served indefinitely without committing a high crime or misdemeanor? Publius appears to dodge the question. Most officers subject to that standard of impeachment—presidents, vice-presidents, senators, and representatives—serve for a defined length of time. But inferior executive officers also may be impeached for treason, bribery, and high crimes and misdemeanors, yet the Constitution sets no term length for such officers. Moreover, the Constitution is unclear as to whether such officers serve at pleasure. Publius in fact indicates in Number 77 that they do not serve at the pleasure of the president: "It has been mentioned as one of the advantages to be expected from the co-operation of the senate, in the business of appointments, that it would contribute to the stability of the administration. The

With these two rules of thumb in view, Publius' next step is to explain how the government established by the Constitution complies "in the most rigid sense" with the definition of republicanism.[39] The House of Representatives is easiest, because it is "elected immediately by the great body of the people" and "is periodically elective."[40] The Senate "derives its appointment indirectly from the people," that is, by the choice of state legislatures, and also is "elective, serving for the period of six years."[41] Like the Senate, the presidency is "indirectly derived from the choice of the people," by way of the electoral college, and the president "continue[s] in office for the period of four years."[42] These three institutions are, for the purposes of republicanism, more or less indistinguishable: Officers are elected either directly by the people or indirectly through representative bodies, and serve for a period of years, at which point they may be reelected. The judiciary parallels the Senate and the presidency in that judges are selected "through a remote choice" of the people themselves—that is, by the nomination of the

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consent of that body would be necessary to displace as well as to appoint." Fed. No. 77, p. 515. According to Publius, therefore, there are two ways to remove an executive-branch officer who needed Senate confirmation before taking office: First, if the president and a bare majority of the Senate agree to removal; second, if the House of Representatives impeaches and two-thirds of the Senate convicts in an impeachment trial. The first of these methods of removal might conform to the requirements of "at-pleasure" tenure, although two branches of government are required. Of course, the Congress and the Supreme Court have rejected Publius' account of removal of executive-branch officers, respectively, in the Decision of 1789 and in *Meyers v. United States*. *See generally* Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021 (2006); 272 U.S. 52 (1926). This is to say that, now, executive officers serve at the pleasure of the president.

39. Fed. No. 39, p. 252.

40. Fed. No. 39, p. 252.

41. Fed. No. 39, p. 252.

42. Fed. No. 39, p. 252.

president and confirmation of the Senate, both of which are republican institutions. And the judiciary's republican character is secured by judges' tenure—good behavior—effected by the procedure of impeachment.

Publius, however, understands that these four institutions do not make up the entirety of the national government: "The tenure of the ministerial offices generally, will be a subject of legal regulation, conformably to the reason of the case, and the example of the State Constitutions."[43] Publius does not tell us how these "ministerial" officers—probably executive-branch officers—are to be appointed or for what tenure they will serve. How, then, does this group within national government conform to the definition of republicanism? Can Congress create an office held by an officer who serves for life? Of course, such an officer would be subject to impeachment for treason, bribery, and other "high Crimes and Misdemeanors."[44] But Publius' next comment provides a more compelling reason why such an officer cannot serve for life. The Constitution, he writes, provides for an "absolute prohibition of titles of nobility" established by the federal government, a most "decisive" indicator of the government's republican character.[45] Lifetime appointments without any possibility for removal—even if elected by the people—would amount to a title of nobility.

Notably, in this passage Publius transforms the discussion of republicanism from one about governments as a whole to one about discrete institutions within governments. Sparta, Carthage, Rome, Holland, Venice, Poland, and Great Britain had, at times, been

43. Fed. No. 39, p. 253.

44. U.S. CONST. art II, § 4.

45. Fed. No. 39, p. 253.

termed "republics" simpliciter. The point appears to be that the republican designation was bestowed mistakenly, and the error arose because each office within their regime was not measured against the definition of republicanism. These states appeared republican on the whole, but strict republicanism requires an institution-by-institution analysis. The critical mistake is most clear in the case of England; although they have "one republican branch," this branch is combined with a "hereditary aristocracy and monarchy," neither of which may claim the republican mantle.[46] England cannot be called a republic in truth because because it is only partly republican.

Publius' demand for an entirely republican government quite clearly applies to the national government. Seldom, however, has it been noticed that this demand extends equally to the state governments. Yet this requirement is apparent from the face of the Constitution: The Guarantee Clause provides that the federal government "shall guarantee to every State in this Union a Republican Form of Government."[47] Moreover, it vests the national government with the power to use force to protect the states from "Invasion" and "domestic Violence"—presumably in service of the guarantee of the republican form of government, if also for other reasons.[48] That is, should a non-republican government take hold in a state, it is incumbent upon the federal government to intervene to re-establish a republican state government.

It is possible that some dissonance exists between the Guarantee Clause and Publius' insistence on an entirely republican form of government. The Clause does not

46. Fed. No. 39, p. 251.

47. U.S. CONST. art. IV, § 4.

48. *Id.*

define "Republican Form of Government," so there can be no certainty that the Constitution's understanding of republicanism coincides with Publius'. Yet we should remind ourselves here that our exercise is to expound *The Federalist*, not the Constitution itself. The relevant inquiry is therefore into Publius' own reading of the Guarantee Clause. In his most direct discussion of it, Publius writes:

> [T]he authority [granted by the Guarantee Clause to the national government] extends no further than to a *guaranty* of a republican form of government, which supposes a pre-existing government of the form which is to be guaranteed. As long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the Federal Constitution. Whenever the States may choose to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. The only restriction imposed on them is, that they shall not exchange republican for anti-republican Constitutions.[49]

No special mode of government is required of the states, so long as the given mode comports with the republican form.

In Number 39, Publius closes the circle between his understanding of "republicanism" and the notion of republicanism in the Guarantee Clause. In crafting the second rule of thumb discussed above, he explains that the contours of the rule are crafted with the states in mind. Were there a different definition of republicanism, he says, "every government in the United States … would be degraded from the republican character."[50] When explaining how the government proposed by the Constitution conforms with the dictates of republicanism, Publius repeatedly points out how different features of the Constitution parallel various (republican) state constitutions: the Senate is chosen in a

49. Fed. No. 43, p. 292.

50. Fed. No. 39, p. 251.

manner similar to the Senate of Maryland, the tenure for members of the House of Representatives is identical to South Carolina's state representatives, and so forth.

At this point, a question arises as to what justification Publius can give to require that the states retain a republican form of government. After all, should a state decide to install an aristocracy or monarchy at the behest of the people, it would not obviously disturb the balance of powers between the state and national governments. The national government would remain able to organize a military, conduct wars with foreign nations, tax both internally and externally, and solve collective action problems between the states. And a state aristocracy or monarchy could in principle exercise the police powers traditionally wielded by the states.[51]

The preliminary answer to this question is that republican government is required in the states for all the same reasons that republican government is required at the federal level: namely, because human nature, the principles of the Revolution, and the genius of the people require it. (These justifications are explored in the subsequent sections of this chapter.) It therefore suffices to state this justification here as plainly as possible: If the people of America deserve a strictly republican government at the federal head, then they deserve strictly republican governments at the state level as well.

But a deeper, more compelling answer is also available: The republican character of the federal government *itself* turns on the republican character of the state governments. Each branch of the federal government, Publius observes in Number 45, relies in some way on the state governments. House districts are drawn by state

51. Note, however, that such a state government would not only violate the Guarantee Clause, but would also violate the prohibition on the states granting titles of nobility. *See* U.S. CONST. art. I, § 10, cl. 1.

legislatures; senators are selected by state legislatures;[52] electors in the electoral college are selected by state legislatures; and Supreme Court justices are installed by the President and the body of senators, each of which owes their office in some way to the state legislatures. Publius makes this point starkly when he writes, "Without the intervention of the State Legislatures, the President of the United States cannot be elected at all,"[53] and he goes on to make similar points about the House and Senate. But as we saw earlier in this section, Number 39 contends that an institution may be bestowed with the moniker "republican" only if the officers that staff the institution ultimately obtained their office from the people. The risk is this: If a state were to establish a legislature on the model of the House of Lords in the United Kingdom—a legislative body *un*accountable to the people—then the federal institutions that rely on state legislatures for appointing their officers would be of dubious republican character. The worst-case scenario involves each state establishing an entirely non-republican government; that state of affairs would deprive the federal government of its status as a strictly republican regime. The republicanism of the state governments (and the Guarantee Clause, which establishes

52. Of course, this feature of the original Constitution was overturned by the Seventeenth Amendment, which provides for direct popular election of Senators within each state. U.S. CONST. amend. XVII. To be sure, the Seventeenth Amendment does not compromise Publius' demand that the federal government be entirely republican, because direct election of Senators preserves the Senate's character of being ultimately sourced in the people. Likewise, the Seventeenth Amendment does not impact Publius' claim that the republican character of the federal government turns on the republican character of the state governments: the House and the presidency's reliance on the state governments is unaltered by the Seventeenth Amendment; the Supreme Court remains reliant on the state governments in that Supreme Court justices must be nominated by the president.

53. Fed. No. 45, p. 311.

their republicanism as a constitutional matter) is thus a necessary element of Publius' demand that the federal government be strictly republican.

The key insight that Publius draws out here, then, is that the federal government must be at least as republican as the states. "Who are to be the electors of the federal representatives?" Publius asks in Number 57. "Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than humble sons of obscure and unpropitious fortune." Rather, "the electors are to be the great body of the people of the United States. They are to be the same who exercise the right in every State of electing the corresponding branch of the Legislature of the State."[54] This link is rhetorically important because it disarms many of the Anti-Federalist arguments against ratification of the Constitution. After all, these Anti-Federalists not only have a competing conception of federalism, but also, according to Publius, mistakenly believe that the state constitutions match their narrower conception of republicanism.[55] Publius both analogizes the republican character of the national constitution to the republican character of the states and emphasizes that the republican character of the national government turns upon the republican character of the states. He thereby turns the Anti-Federalists' jealousies back against them.[56]

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54. Fed. No. 57, p. 385.

55. For example, in Number 78 Publius points out that some state constitutions, including New York, permit judges to serve during good behavior and for a very long term of office. Such institutions would seem to conflict with the account of republicanism provided in Number 37. Fed. No. 78, p. 522. Accordingly, although it can be said that the state constitutions generally comply with the narrower understanding of republicanism in Number 37 than does the new national government, the states' compliance with that narrower standard is not altogether secure.

56. Even if the Anti-Federalists conceded that the national government's structures would comply with the dictates of republicanism, they had a fallback position that they believed carried significant force: a genuine republic could not function on too large a

When we first encountered Publius' final definition of republicanism in Number 39, it may have seemed that the parameters of the definition were written rather conveniently. In other words, it appears that the definition in Number 39 is designed to rescue the proposed national government from the accusation that it does not comply with the republican form. This suspicion may be strongest when noticing that Publius includes "good behavior" in the list of acceptable terms of office, because it so closely parallels the constitutional tenure for federal judges. But if indeed the definition in Number 39 is an "after-the-fact definition,"[57] it may be the case that it was written not to save the national government from the accusation of being non-republican, but rather to save the states the very same embarrassment.

Publius began Number 39 observing that, if the Constitution is "found to depart from the republican character" even slightly, then its advocates "must abandon it as no longer defensible." That claim is broader than it initially seems—implicating the essential concept of representation, applying to each institution within government, and reaching across the divide into the state governments. What has gone unexamined until this point, though, is why Publius argues that a non-republican government would be "no longer defensible." In the remaining three sections of this chapter, we take up the three possible justifications for an entirely republican government: human nature, the Revolution, and the unique character of the American people.

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scale. Certainly, they maintained, a republic could not operate on a continent-wide scale. For a summary of this objection, see Cecelia M. Kenyon, *Men of Little Faith: The Anti-Federalists on the Nature of Representative Government*, 12 WM. & MARY Q. 3, 6-7 (1955).

57. Peterson, *supra* Chapter 1, note 9, at 47.

HUMAN NATURE

The Federalist is widely regarded as the first, and perhaps the greatest, American contribution to the history of political thought. Partly on account of this view, many have sought to read *The Federalist* as propounding a detailed, thick account of human nature, not unlike other great works in political philosophy. Though there exist many passages in *The Federalist* to support that view, its shortcomings are evident from the fact that nowhere in the eighty-five essays does Publius straightforwardly explain his view of human nature. (This should not surprise us; original readers read the newspaper series for the arguments it made regarding the practical question of ratification, not for a general theory of politics or mankind.) On the contrary, Publius' discussion of human nature typically comes in the form of stray comments or discussions in need of considerable exegesis. But one unmistakable upshot of Publius' view of human nature—however thin or thick it may be—is its relationship to the demand for republican government. Publius tells us outright that only strict republicanism is reconcilable with "that honorable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government."[58] Although Publius' view of human nature is, in point of fact, quite thin, this section argues that it is sufficiently robust—especially regarding honor as an essential component of man's nature—to explain the necessity of republicanism.

One debate among scholars has concerned whether *The Federalist*'s account of human nature was (on the one hand) pessimistic or (on the other) tepid. Benjamin Wright most clearly expressed the pessimist's view, writing that for Publius "men are not to be

58. Fed. No. 39, p. 250.

trusted with power because they are selfish, passionate, full of whims, caprices, and prejudices."[59] Human nature is not only "defective" but "constant."[60] Publius denies that men are angels,[61] but he is silent as to whether men are devils. Man is full of "folly," "wickedness," and "depravity.[62]" Citing Publius for the proposition that it is difficult "control the caprice and wickedness of mankind," Wright understands the Constitution as an attempt to prevent government from becoming the instrument of man's innate depravities. On this view, Publius' theory of human nature resembles Hobbes': Man seeks "by force or wiles to master the persons of all men he can, so long till he see no other power great enough to endanger him."[63] What's more, Publius and Hobbes are in agreement that government can substantially restrain man's nastiest inclinations, even though they differ as to which type of regimes are capable of doing so.

The pessimistic view typified by Wright has been ably and rightly criticized on the grounds that it overlooks several positive or neutral remarks about human nature in *The Federalist*.[64] "As there is a degree of depravity in mankind which requires a certain degree

59. Benjamin F. Wright, The Federalist *on the Nature of Political Man*, 59 ETHICS 1, 4 (1949).

60. *Id.* at 4.

61. Fed. No. 51, p. 349.

62. Fed. No. 78, p. 529; *see also* Fed. No. 56, p. 378.

63. THOMAS HOBBES, LEVIATHAN, I.xiii.4, at 75 (ed. Edwin Curley). See also Wright's comparison between Hobbes and Hamilton's "belief that power and force are the essential bulwarks of security." Wright, *supra* note 59, at 18. For a general comparison of Publius and Hobbes, see Gary L. McDowell, *Private Conscience & Public Order: Hobbes &* The Federalist, 25 Polity 421 (1993).

64. *See* Neal Riemer, *James Madison's Theory of the Self-Destructive Features of Republican Government*, 65 ETHICS 34 (1954); Mary Ann Glendon, *Philosophical Foundations of* The Federalist Papers*: Nature of Man and Nature of Law*, 16 HARV. J. L. & PUB. POL'Y 23, 28 (1993).

of circumspection and distrust," Publius writes, "[s]o there are other qualities in human nature, which justify a certain portion of esteem and confidence."[65] "The supposition of universal venality in human nature is little less an error in political reasoning than the supposition of universal rectitude."[66] These remarks support another view of human nature in *The Federalist*, one that might be called the "intermediate view."[67] The intermediate view contends that Publius' understanding of human nature is neither pessimistic nor optimistic: human nature is a mixed bag. "[T]here is a portion of virtue and honor among mankind,"[68] upon which faith in government rests, yet the "infirmities and depravities of the human character"[69] counsel against trusting too much. The intermediate view of human nature neither "flatter[s] its virtues [nor] exaggerat[es] its vices."[70]

In 1959, James P. Scanlan provided an important corrective to this debate between the pessimistic and intermediate readings. The problem with the pessimistic view, Scanlan urged, lies not only in its neglect of *The Federalist*'s more buoyant comments concerning human nature. The pessimistic view is deficient also because it renders "the political conclusions of *The Federalist* … at odds with its psychological premises." According to the pessimists, mankind is "intellectually feeble," yet the essays presume

65. Fed. No. 55, p. 378.

66. Fed. No. 76, p. 513-514.

67. For an example, see Joseph F. Kobylka & Bradley Kent Carter, *Madison, "The Federalist," & the Constitutional Order: Human Nature & Institutional Structure,* 20 POLITY 190 (1987).

68. Fed. No. 76, p. 514.

69. Fed. No. 37, p. 238.

70. Fed. No. 76, p. 514.

that men can be "moved by elaborate reasoning"; mankind is also "morally feeble," yet the Constitution's political project stipulates that man can "safely be given political power."[71] The general point is that a lawgiver harboring a pessimistic view of human nature would be unlikely to advocate for a government like the one described in the Constitution of 1787. Similarly, Scanlan argued that that the intermediate view is too conceptually thin to be at all philosophically interesting: "To assert simply that men are both good and bad, partly but not completely rational, explains nothing. Such a view can hardly be regarded as a theoretical source, ground, or test of political doctrines, for it has no specific implications."[72] If human nature's political significance lies in the fact that it is upstream of politics, then an imprecise formulation of human nature risks having no political significance whatsoever.

Scanlan attempted to overcome the deficiencies of the pessimistic and intermediate views by refocusing the question. Publius does not provide a "comprehensive theory of 'human nature'," Scanlan says, because doing so would take *The Federalist* far afield of its political project. Instead, Publius presents a "theory of 'human motivation,' related to political action," and subsequently interrogates whether the institutions established by the Constitution, in combination with men's motivations, will yield desirable outcomes. Scanlan detects this distinct line of inquiry not only in Publius' usage of the word "motive," but in others, like "springs," "impulses," "dispositions," and others.[73] Subsequent scholarship followed largely in the same vein.

71. James P. Scanlan, *The Federalist & Human Nature*, 21 R. POL. 657, 658 (1959).
72. *Id.* at 659.
73. *Id.* at 660-61.

For example, Morton White devotes an entire chapter of his book to the issues of motive, opportunity, and action.[74] According to White, "Publius believes that a motive will produce an action only if the agent has an opportunity to act on that motive," an insight which applies not only to individuals but also to factions.[75] Around the same time, Daniel Howe situated Publius' motivational theory within "faculty psychology," a framework inherited from the Earl of Shaftesbury and Thomas Reid.[76] Within this framework, Publius set out a "definite sequence of rightful precedence among conscious motives: first reason, then prudence (or self-interest), then passion."[77] Even more recently, Jon Elster has authored an essay on Publius' adoption of a "'folk' model of behavior, as based on the desires of the agents and their beliefs about how to achieve them," a model especially focused on reason, passion, and interest.[78] In general, then, it might be said that Scanlan effected a "motivational turn," according to which Publius was engaged in what contemporary philosophers would call philosophy of action, rather than an inquiry into human nature broadly defined.

Scanlan's motivational turn is almost certainly correct in one important respect. When we sift out Publius' bromides about human nature (for example, "there are other

74. WHITE, *supra* Introduction, note 25, Chapter 9.

75. *Id.* at 131-32. White contends later that this theory of motivation and opportunity is one of the central "experimental or empirical theses" in *The Federalist*. There, he also describes the framework as a "psychological theory of motivation," since different motives carry different weight. *See id.* at 197-98.

76. Daniel W. Howe, *The Political Psychology of the Federalist*, 44 WM. & MARY Q. 485, 489 (1987).

77. *Id.* at 491.

78. Jon Elster, *The Political Psychology of Publius: Reason, Passion, and Interest in* The Federalist, in THE CAMBRIDGE COMPANION TO *THE FEDERALIST*, 196 (Jack N. Rakove & Colleen A. Sheehan eds. 2020).

qualities in human nature, which justify a certain portion of esteem and confidence"),[79] we indeed are left largely a theory of motivation and action specifically as it relates political and public action, not human nature more generally. Publius does not inquire into many of the traditional provinces of human nature: man's origins; whether man is by nature solitary or social; the significance (or insignificance) of the family; the character of education; the essence of virtue; and whether man has a natural purpose or *telos*. Even so, Scanlan reminds us, Publius' account of human motivation and action is rather robust and does considerable work in explaining the political theory of *The Federalist*.

This motivational turn is useful in reframing the question of human nature in *The Federalist*, but one intractable problem remains: In Number 39, Publius links the demand for a strictly republican government to human nature, yet a view of human nature largely focused on motives, opportunities, and action does not obviously support republicanism, much less strict republicanism. Is a fuller account of human nature—an account that *The Federalist* evidently lacks—necessary to justify republicanism?

David F. Epstein has answered this question in the negative by arguing that the argument for a republican government is "necessarily assertive rather than conclusive."[80] Additionally for Epstein, human nature appears to be the only sound ground on which Publius can rest the case for republicanism. On Epstein's reading, the other two grounds mentioned in Number 39—the "genius of the people" and the "fundamental principles of the Revolution," which are discussed in the subsequent two sections of this chapter—

79. Fed. No. 55, p. 378.

80. EPSTEIN, *supra* Introduction, note 18, at 112.

only dubiously support republicanism.[81] Epstein therefore surmises that human nature is the most "expansive" (decisive?) justification given for republicanism.[82]

But Epstein is quick to qualify this claim. Like Scanlan, Epstein takes *The Federalist*'s account of human nature to be rather cabined, though cabined in a different way. In Number 37, Publius proceeds at length regarding the indeterminacy of man's intellectual faculties as well as their fallibility.[83] Thus there exists "a considerable lack of clarity about exactly what faculties or capacities men have."[84] In the face of this "lack of clarity" about man and his nature, Epstein says, the case for republicanism rests only upon an "honorable determination" borne out of that uncertainty.

> Men's capacity for self-government is here not an undeniable truth but a hypothesis on the basis of which votaries of freedom make governmental "experiments." Even if a contrary hypothesis could be inferred from considerable past experience, this hypothesis is adopted out of a certain "honorable determination." If political experiments relying on this hypothesis have failed, other aspects of the experiments can be modified, but this hypothesis must be preserved.[85]

The content of this "honorable determination" is that political experiments ought to be based on the supposed capacity of men to self-govern and "men's honorable wish to

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81. The people's "genius" is possibly compatible with some non-republican institutions, such as Great Britain's monarchical institutions. And the "principles of the Revolution" could be identified either with the "Safety and Happiness" of the people or simply with the right of the people to "institute new Government," either of which could be furthered by non-republican forms of rule.

82. EPSTEIN, *supra* Introduction, note 18, at 119.

83. Fed. No. 37, p. 235 ("Sense, perception, judgment, desire, volition, memory, imagination, are found to be separated by such delicate shades, and minute gradations, that their boundaries have eluded the most subtle investigations, and remain a pregnant source of ingenious disquisition and controversy").

84. EPSTEIN, *supra* Introduction, note 18, at 119.

85. *Id.*

choose for themselves."[86] The determination is "honorable" because it "treats man as being capable of choosing intelligently and ruling,"[87]—a belief that men honorably have of themselves. Republicanism "honor[s] the great body of the people by respecting their capacity to choose,"[88] hence "republic" deserves veneration as an "honorable title."[89]

Were we to shoehorn Epstein into one of the camps described above, he'd agree most with those who express the intermediate view. Epstein departs from the pessimists in that he thinks the "honorable determination" in Number 39 is rather optimistic about mankind; he departs from Scanlan in that he reads Number 37 as offering the final word about the indeterminacy of human psychology, implying that Publius' view of human motivation and action is likewise indeterminate. From the uncertainty attending to the intermediate position, the demand for republicanism is a leap of faith: more honorable to assume that men can govern themselves than to assume they cannot.

Epstein provides a deep reading of Publius' political theory, however his argument may not be as forceful as he supposes. The desideratum in interpreting this passage is not to explain how human nature—or, more precisely, the honorable determination regarding man's capacity to self-govern—supports republicanism broadly understood. Rather, it is to understand how that honorable determination supports the demand for a "*strictly* republican" government. Epstein understands the "genius of the people" as likely requiring at least one republican institution but not a strictly republican regime. The same characterization might be applied to Epstein's interpretation, though.

86. *Id.* at 16.
87. *Id*. at 119-20.
88. *Id*. at 121.
89. Fed. No. 39, p. 251.

If republicanism is a concession to man's belief that he can successfully engage in self-rule—a belief that grows out of man's honorable nature—then it remains to be said why the concession entails *pure* republicanism. In other words, it remains unclear why other forms of rule—aristocracy and monarchy especially—could not be mixed into the regime without denigrating man's honor. That possibility remains especially relevant given both that republicanism remains in tension with the basic safety that government is purposed with providing, and that, according to Epstein, man's capability to engage in self-rule is merely asserted, not proven. Yet Publius would never tolerate a political experiment in which aristocracy and monarchy were admixed with republican institutions. The basic tension may be detected in the following: Epstein emphasizes that the honorable determination about self-government is made by "every votary of freedom"; yet it was the "votaries of free government" who were dismayed when the House of Commons (a republican branch in a regime that is not fully republican) sought to augment their own power.[90] On what basis can a not-strictly-republican regime like Britain's grow out of the honorable determination regarding man's capacity to self-govern?

In the remainder of this section, I wish to propose a way to fill that gap: If Epstein's observations get us to at least one republican institution, on what basis does Publius assert that we need *only* republican institutions? An answer might be found in an understudied passage from Number 70 that explores one of the negative facets of honor—what Publius calls "obstinacy" but we might call "spite." There, Publius describes obstinacy as a basic feature of human nature. It is this facet of honor that explains why

90. Fed. No. 53, p. 361.

strict republicanism is required even when republicanism is deemed to be a concession to man's honor.

Number 70 takes up the crucial issue of a unitary executive.[91] Publius begins with an affirmative case for a single executive: "Decision, activity, secrecy, and despatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number," and these characteristics are especially important to energetic enforcement of the law. But Publius quickly moves on to the negative argument, that is, the reasons why a plural executive would be harmful. The Achaeans, he says, once "experiment[ed]" with two Praetors, but were "induced to abolish one," presumably because of inefficacy. The Romans fared slightly better with their two-consul executive, but only because (1) both consuls were patricians and thus allies in the "perpetual [class] struggle with the plebeians"; and (2) eventually the consuls divided their power, with one of them "remaining in Rome to govern the city and its environs," while the other commanded the "more distant provinces." The mixed evidence of the Achaeans and Romans indicates that the "dim light of historical research" must be abandoned—experience is not sufficient to resolve the question as to whether a plural or single executive is to be preferred. (Indeed, this is a rare instance in which Publius rejects experience and history as a guide to politics.) Instead, the investigation must turn "purely" to the "dictates of reason and good sense."

Publius proceeds to elaborate the negative consequences that follow when "two or more persons are engaged in any common enterprise or pursuit." Always present is the "danger of difference of opinion." But that difference of opinion is especially

91. Not to be confused the unitary executive theory of Article II.

dangerous when the two persons share the same "public trust or office." Their shared office confers "equal dignity and authority" upon them, meaning "there is peculiar danger of personal emulation and even animosity. From either, and especially from all these causes, the most bitter dissensions are apt to spring." Although these "bitter dissensions" are worst when the competitors are co-equal in public office, the basic phenomenon grows out of something resembling human nature.

> Men often oppose a thing merely because they have had no agency in planning it, or because it may have been planned by those whom they dislike. But if they have been consulted and have happened to disapprove, opposition then becomes in their estimation an indispensable duty of self love. They seem to think themselves bound in honor, and by all the motives of personal infallibility[,] to defeat the success of what has been resolved upon, contrary to their sentiments.[92]

This passage distinguishes between three kinds of "obstinacy" that men are inclined to feel. (In addition to "obstinacy," Publius also calls this characteristic "vanity" and "conceit," but we'll consider everything under the heading "obstinacy.") One type arises through no provocation, but only when a plan is devised (a public plan?) without the man's consultation. A second type occurs when the plan is orchestrated by a fellow for whom a man holds personal animosity. (One might wonder whether the second type of obstinacy is just a sub-species of the first type, a question that becomes clearer when the third category comes into view.) Although obstinacy arises in these two situations "often," Publius does not say that obstinacy is inevitable. It stands to reason that a man may not expect to be consulted on many questions, and thus would find no offense in not being consulted; moreover, a man may, under the right circumstances, acknowledge that

92. Fed. No. 70, p. 475.

his nemesis is the right person to devise a plan and thus suffer no spite because of it. The third and most vicious type arises when a man's opinion is "consulted" during deliberations but is ultimately rejected. Opposition to the final plan becomes for the man a "duty of self-love." The use of the word "duty" here is significant for it connotes an obligation, and thus that this extreme type of obstinacy is more or less an inevitable result of this provocation. Rejection of a man's plan is provocative because it denies the man's "personal infallibility"—that is, his sense that he chooses well—and thus is an affront to his honor. In this third set of circumstances, a man is "bound in honor" to oppose the final plan.

Publius views obstinacy as a "despicable frailty" and a "detestable vice" of human nature. Yet he immediately acknowledges that it has some place in public life: "In the legislature, promptitude of decision is oftener an evil than a benefit," and consequently obstinacy "must necessarily be submitted to" in that context. "The differences of opinion, and the jarrings of parties in that department of the government, though they may sometimes obstruct salutary plans, yet often promote deliberations and circumspection, and serve to check excesses in the majority." Publius gives these compliments to obstinacy in a context where men are occupying the same office—representatives of the people—and thus have co-equal votes. In the right context, then, vice transforms into the servant of virtue.

Publius' main subject in Number 70 is the executive, but his discussion of obstinacy in the legislative branch suggests how this facet of honor carries over to the larger public. Epstein is likely correct that the honorable determination about man's capacity for self-government entails some form of republicanism. This means that men are to be given *some* say in their government, for it assumes that they have some capacity

to choose well. It might be said at this point that men must be "consulted," placing them squarely in the third category discussed in Number 70. A lawgiver is thus presented with the following choice: institute an entirely ("strictly") republican regime, in which the people possess influence over all public institutions; or incorporate aristocratic or monarchical elements into the regime, and risk the obstinacy that results when the popular body's honor has been insulted. A regime with some republican elements but which is not purely republican equivocates as to man's capacity to rule himself. Such a regime concedes that man's honorable capability to make some good choices deserves some deference, while insinuating that in the end man's capacity to make those good choices is not reliable, and thus non-republican precautions are necessary. Only a strictly republican government is reconcilable with man's sense of his own honor[93] and capacity because anything less would be an insult to that honor and capacity.

THE REVOLUTION & THE UNION

Second in the list of justifications for strict republicanism are "the fundamental principles of the Revolution."[94] By Revolution, Publius of course means the American Revolution, the war of independence fought by the colonists against the Crown. But what

93. It should be noted that Publius departs from Montesquieu here in a significant respect. For Montesquieu, societies were motivated by different animating principles. But he considered honor to be the principle undergirding *monarchy*, not republicanism. Montesquieu contended that republics were motivated by virtue instead, and tyranny by fear. Thus Publius turns Montesquieu on his head—republicanism is the pinnacle of free government, but republicanism grows out of honor rather than virtue. *See* MONTESQUIEU, THE SPIRIT OF THE LAWS, III.3 (republics organized around virtue), III.6 (monarchies organized around honor), III.9 (despotic governments organized around fear); WILLS, *supra* Introduction, note 25, 180 (1981).

94. Fed. No. 39, p. 250.

are the principles of the American Revolution according to Publius and what relation do those principles have to republicanism? In contrast to the other two justifications on which Publius rests the case for republicanism—human nature and the genius of the people—the American Revolution is little discussed in *The Federalist*. Publius uses the term "revolution" (or its derivatives) thirty-seven times in *The Federalist*, yet only eleven are references to the American Revolution.[95] More discouraging still, few of these eleven references implicate even slightly the Revolution's "principles." Many invoke the Revolution simply as a historical marker ("lands which were ungranted at the time of the revolution")[96] or even as a theological event (the "Almighty hand [was] so frequently and signally extended to our relief in the critical stages of the revolution").[97] This section presents a hypothesis—but only a hypothesis, in light of *The Federalist*'s general disinterest in the Revolution—that the core principle of the Revolution was human equality, or the notion that no individual has a right by nature to rule. Accordingly, the

95. The balance of these uses falls into three categories. First are references to past revolutions in other nations, such as the "petty Republics of Greece and Italy" (Fed. No. 9, p. 50), the Netherlands (Fed. No. 20, p. 124) or the Glorious Revolution of 1688 in Britain (Fed. No. 26, p. 165-166). Second, Publius uses "revolution" or "revolutions" as a general term to signify tremendous change in political affairs—hence there has been an "intire revolution in the system of war" (Fed. No. 8, p. 47) and empires routinely experience "revolutions and dismemberments" (Fed. No. 17, p. 104-105). Third, Publius uses revolution to refer to the possibility of national crisis (Fed. No. 69, p. 463), especially the remote chance (imagined by the Anti-Federalists) of coups d'état by the Senate (Fed. No. 63, pp. 429, 431).

96. Fed. No. 7, p. 37. *See also* Fed. No. 24, p. 156 ("Previous to the revolution, and even since the peace, there has been a constant necessity for keeping small garrisons on our western frontier"); Fed. No. 47, p. 328 ("I pass over the constitutions of Rhode-Island [*sic*] and Connecticut, because they were formed prior to the revolution").

97. Fed. No. 37, p. 238.

principles of the Revolution support republicanism insofar as republicanism also rests on that principle.

In the main, scholars have taken Publius's gesture toward the "principles" of the Revolution to be a reference to the Declaration. Colleen Sheehan has recently stated that position plainly: "[I]n *Federalist* 39, the reference to the principles of the Revolution means of course the principles of the Declaration of Independence—the principals that inform the genius of the American people and ground their experiment in self-government."[98] Sheehan links the Declaration with republicanism, explaining that "[o]nly a genuine republic would answer the call of the generation of Americans who risked their lives during the Revolutionary War. Nothing but the opportunity to govern themselves would satisfy the clarion call of the Declaration of Independence."[99] Epstein makes a similar connection, supposing that Publius believed the principles espoused in the Declaration of Independence were identical or subsidiary to the principles of the Revolution. He therefore identifies the "fundamental principles of the Revolution" with the "Safety and Happiness" of the people, an aim intimately connected to the right to revolt against despotic government.[100]

Both of these views begin with difficult-to-dispute proposition that the Declaration is the source of the principles of the Revolution, both generally and in Publius' view. But both elide the core principle of the Declaration from which its other conclusions follow:

98. Colleen A. Sheehan, *The Republicanism of Publius: The American Way of Life*, in THE CAMBRIDGE COMPANION TO THE FEDERALIST 329 n.9 (Jack N. Rakove & Colleen A. Sheehan eds. 2020)at 326, n. 9.

99. *Id.* at 305.

100. EPSTEIN, *supra* Introduction, note 18, at 119.

"that all men are created equal." Sheehan leaves that point unsaid, but Epstein misunderstands the end of government according to the Declaration (the "Safety and Happiness" of the people) with the premise upon which that proposition relies: that because men are equal insofar as having "certain unalienable Rights," including "Life, Liberty, and the pursuit of Happiness," government must serve those ends—hence it must give men safety and happiness. Epstein regards the safety and happiness of a community as needing no theoretical justification. But the importance of those aims is precisely what the beginning of the Declaration is designed to show. Safety and happiness cannot be understood as one of the ends of government without endorsing human equality.

Equality entails republicanism on the Declaration's view because equality rejects the proposition that some men have a right to rule. Men are equal insofar as they each are "endowed" with the same rights, including Liberty.[101] If it were the case, as Jefferson denied, that some men are born with saddles on their backs and others with boots and spurs,[102] then men would not be equal in respect to their endowment of rights, especially with respect to the right to Liberty. The right to rule is incompatible with human equality. That idea explains the logical jump in the Declaration's most critical section: The Declaration moves immediately from equality of rights to the claim that "to secure these rights, Governments are instituted amount Men, deriving their just powers from the

101. In stating as much, the Declaration was making a statement about individual and collective natural rights. For a discussion of the presence of natural rights in The Federalist, including the right of revolution, see Constant Noble Stockton, *Are There Natural Rights in "The Federalist"?*, 82 ETHICS 72 (1971).

102. Letter, Thomas Jefferson to Roger Weightman, June 24, 1826, LIBRARY OF CONGRESS, available at https://www.loc.gov/exhibits/jefferson/214.html.

consent of the governed" without explanation. Men's rights are equal—and fragile—but why must consent be required? To the extent rights must be secured in order for men's equality to be respected, some authority must guarantee and enforce natural rights. And the only authority capable of accomplishing that task while adhering to the principle of human equality is a government "deriving [its] just powers from the consent of the governed." Otherwise, a man's natural jurisdiction over his own life, liberty, and happiness would be forfeit. That consent, roughly speaking, is precisely what Publius understands republicanism to be. When the people lack the right to choose their rulers, their consent is no longer a prerequisite to rule, so revolution becomes a justifiable course of action.

It is for this reason that only passage of *The Federalist* to discuss the Declaration head-on appears to concern revolution per se. In fact, the immediate context of the passage is not the American Revolution at all, but a later event: the Annapolis Convention, which proposed (without authority) to host the Convention at Philadelphia. The Declaration there is rendered as standing for the proposition that the people can overthrow their rulers for the purposes of securing their safety and happiness.

> [I]n all great changes of established governments, form ought to give way to substance; that a rigid adherence in such cases to the former, would render nominal and nugatory, the transcendent and precious right of the people to "abolish or alter their governments as to them shall seem most likely to effect their safety and happiness."[103]

Publius' move here is a deft one: If the Anti-Federalists wish to charge the leaders of the Annapolis and Philadelphia Conventions with organizing a coup, then the Anti-

103. Fed. No. 40, p. 265.

Federalists must levy a similar charge at attendees of the Second Continental Congress and perhaps the leaders of the Revolution itself. Both, according to Publius, can be explained by the Declaration's proclamation that government must serve the ends of human safety and happiness, which in turn relies on the consent of the governed and—in the final analysis—the doctrine of human equality.

It might be a little surprising, then, that Publius most often raises the Revolution with respect to the question of union. In Number 23, for example, he understands the Revolution to have instructed Americans about the importance of having a central authority for military affairs. So too in Number 14. The Revolution is said to have "no parallel in the annals of human society," and the revolutionaries "reared the fabrics of governments which have no model on the face of the globe." The Revolution's singular importance is that it permitted the "design of a great confederacy, which it is incumbent on their successors to improve and perpetuate."[104]

The association between the Revolution and union is not a challenge to the claim that human equality is the principle of the Revolution Publius hopes to call to mind in Number 39. Rather, it is a point in support. That is because Publius' general point about union throughout the work is that it is essential to the safety and happiness of the American people.

> [I]f, in a word, the Union be essential to the happiness of the people of America, is it not preposterous, to urge as an objection to a government without which the objects of the Union cannot be attained, that such a government may derogate from the importance of the Governments of the individual States? Was then the American revolution effected, was the American confederacy formed, was the precious blood of thousands spilt, and the hard earned substance of millions lavished, not that the people of

104. Fed. No. 14, p. 89.

> America should enjoy peace, liberty, and safety; but that the Governments of the individual States, that particular municipal establishments, might enjoy a certain extent of power, and be arrayed with certain dignities and attributes of sovereignty?[105]

Here, the Revolution stands opposed to the Anti-Federalist fixation with state power and sovereignty. Reserving too much power to the states, especially power over war, leads not only to a coordination problem, but to friction, thus jeopardizing the "peace, liberty, and safety" aimed at by the Revolution. But the Revolution did not aim at the safety and happiness of the American people for no reason—it did so because that it is the only justifiable aim of a government that takes human equality as its core doctrine.

To be sure, Publius discusses the Revolution so infrequently and without much depth, so it is difficult to say conclusively whether and how all of these concepts fit together cleanly. The most we can say is that, when Publius raises the "fundamental principles" of the American Revolution, he likely has in mind the Declaration as well as the Declaration's own core idea: human equality. That reading squares best with Publius' meandering discussions of the Revolution and provides a basis for his claim in Number 39 that the Revolution and republicanism share a special relationship.

THE GENIUS OF THE PEOPLE

The third and final basis on which Publius rests the demand for a strictly republican government is the "genius" of the American people. "Genius" deserves explanation for at least two reasons. In the first place, modern readers are likely to be confused by Publius' use of the word. It may be inferred that Publius' usage does not

105. Fed. No. 45, p. 309.

match the modern meaning of the term (that is, an unusually intelligent person or unusual intelligence generally); such an interpretation would sit uncomfortably with many passages in *The Federalist*.[106] Consequently, we should not understand Publius in Number 39 to be suggesting that the American regime must be strictly republican because the American people are unusually intelligent, and we must endeavor to understand how it is that Publius uses this word. Second, once we have Publius' understanding of genius in view, we must ask what the genius of the American people actually is and how it relates to republicanism. Publius' remark suggests that different peoples have different geniuses—not only do the Americans have a unique genius, but so do the British, the French, the Germans, and so on. In what way is the American people's genius different from these other groups, and what does it have to do with republicanism? This section seeks to answer these questions. First, it examines usages of the word "genius" both inside and outside *The Federalist*, finding that it means something along the lines of "spirit," or what contemporary speakers might even call "culture." Second, it raises doubts that the genius of the American people is easily identifiable with the "genius of republican government"—the other context in which Publius deploys "genius" several times in *The Federalist*. The genius of republican government and the formulation of republicanism in Number 39 are to some extent incompatible. Instead, the genius of the

106. For example, in Number 11 Publius speaks of the "genius of the American Merchants and Navigators," which he associates with the "spirit of enterprise." Fed. No. 11, p. 69. This is not to say that mercantilism and navigation are unintelligent skills, just that it would be odd view this as a compliment to merchants' and navigators' intellect. Later, Publius relates that commerce, finance, negotiation, and war are the only subjects which "have charms for minds governed by" ambition. Fed. No. 17, p. 105. Merchants and navigators certainly may be occupied by this studies, but Publius' emphasis here is on ambition, not intelligence.

people can more easily be located by looking at state governments, which already conform to the genius of the people of America.

Although its importance should not be overstated, the etymology of "genius" is instructive. In Latin, *genius* referred to "supernatural being[s]" generally, but more specifically to the "tutelary god or attendant spirit allotted to every person at birth to govern his or her fortunes and determine personal character."[107] It might be said that Socrates' *daimon* was his *genius*[108] or that Athena was the *genius* of Athens. Although the concept may have been most influential in developing the concept of the patron saint, *genius* understood as a spirit supervising or protecting a person or group evidently survived into the founding period. On July 5, 1776—a single day after the independence of the American colonies was announced—the Commonwealth of Virginia adopted its "Great Seal," described as follows:

> VIRTUS, the genius of the commonwealth, dressed like an *Amazon*, resting on a spear with one hand, and holding a sword in the other, and treading on TYRANNY, represented by a man prostrate, a crown fallen from his head, a broken chain in his left hand, and a scourge in his right.[109]

107. *Genius*, Oxford English Dictionary (3rd ed. 2014), available at https://www.oed.com/view/Entry/77607?redirectedFrom=genius&.

108. PLATO, THE REPUBLIC, 496c (Allan Bloom tr. 1968) (Socrates implying that his capability to philosophize is connected with his *daimon*). The connection between his *daimon* and *genius* may be further corroborated by noting that Plutarch's *Moralia* contains a tractate titled *Peri Tou Sôkratous Daimoniou* ("On Socrates' *Daimon*"), frequently translated to Latin as *De Genio Socratis*.

109. Report of the Committee Appointed to Devise a Great Seal for the Commonwealth of Virginia, July 5, 1776, available at https://www.consource.org/document/report-of-the-committee-appointed-to-devise-a-great-seal-for-the-commonwealth-of-virginia-1776-7-5/.

Virtus was a deity in the Roman pantheon, traditionally associated with manliness. "Virtus" derives from *vir*, the Latin for "man." Even so, the god Virtus was frequently depicted as a goddess—in particular, an Amazon—and frequently associated with the Roman state itself.[110] Virtus would eventually become associated with all excellencies, hence it gave birth to our word "virtue."[111] In designating Virtus to be the *genius* of Virginia, the legislature indicated that manliness and virtue, both opposed to the oppression of tyranny, should animate and guide the political life of a newly independent state.

Evidence that "genius" described the general spirit or attitude of the people abounds in the founding period, but it seems to have been used in two ways. The first variety parallels what we would call public opinion—that is, the general sense of the people on a specific point of policy. In explaining his reasons for not signing the Constitution when it was forwarded to the states, Edmund Randolph remarked that he had been unable to "ascertain[] … the temper and genius of [his] fellow citizens" before departing for Philadelphia; without these "necessary guides," Randolph averred that he thought it best to withhold his signature from the Constitution "until that temper and genius could be collected."[112] Tempers, like all states of mind, are liable to change. The same thing might be said of public opinion: persuasive arguments and new facts might move the public's opinion on any given issue. Randolph no doubt had this in mind as he

110. MYLES MCDONNELL, ROMAN MANLINESS: "VIRTUE" AND THE ROMAN REPUBLIC, 2, 146 (2006).

111. *Id.* at 128 *et seq.*

112. Letter, Edmund Randolph to the Speaker of the Virginia House of Delegates, October 10, 1787, available at https://www.consource.org/document/edmund-randolph-to-the-speaker-of-the-virginia-house-of-delegates-1787-10-10/.

chaired the Virginia ratifying convention. The second sense in which genius is used indicates something closer to what we might call culture, which is more durable than public opinion. Although culture changes, it does so slowly, often imperceptibly. In a draft speech at the Convention, Charles Pinckney suggested that a government be "suited to the habits & genius of the people it is to govern & must grow out of them."[113] Both habits and genius are changeable, but only with difficulty. Consequently, a government should be designed around *them*, not the habits and genius around the government. Jared Ingersoll made a similar point when he compared the "Genius of the people" to constants like "Climate, Produce, [and] Soil."[114] Each of these features, he said, suggested that the laws not be uniform throughout the union. Just as the soil and climate are not the same in Georgia and Massachusetts, so too are the geniuses of their populaces different, and the laws must be designed judiciously with regard to each feature.

Publius' usage of the term largely appears to track this second category: the general habits, customs, and deeply held views of a people, which are not immutable, but certainly difficult to change. In Number 35, Publius associates the "general genius" of the people with their "habits" and "modes of thinking." Publius immediately zooms out, clarifying what he means by these remarks: "And this is all that can be reasonably meant by a knowledge of the interests and feelings of the people. In any other sense the proposition has either no meaning, or an absurd one."[115] (The immediate context of these

113. Charles Pinckney, Draft Speech by Charles Pinckney, June 25, 1787, available at https://www.consource.org/document/draft-speech-by-charles-pinckney-1787-6-25/.

114. Jared Ingersoll, Draft Speech by Jared Ingersoll, June 20, 1787, https://www.consource.org/document/draft-speech-by-jared-ingersroll-1787-6-20/.

115. Fed. No. 35, p. 222.

remarks is taxation, specifically what prerequisites there might be for a "judicious exercise" of the power to tax. The "proposition" to which Publius seems to refer is the proposition that the person instituting the tax ought to be familiar with the genius of the people, their habits, and their modes of thinking.) It would be odd to read this passage as if it referred to the first category of the usage of "genius"—the sense in which genius simply means the policy preferences of the people. Publius is asserting generally that the "least burthensome" form of taxation is the "most productive," yet this assertion does not seem to be based on the people's wishes—taxpayers prefer not to pay tax if at all possible. Rather, Publius invites us to judge taxes by their productivity, which turns on the burden they pose to society. In turn, the onerousness of a tax depends on more complicated factors, like the habits of a people and their genius. For example, Publius proposes an excise tax on liquor at one shilling per gallon.[116] Not only, he says, would such a tax furnish a "considerable revenue," but it would marginally reduce alcohol consumption to the benefit of the "agriculture, to the œconomy, to the morals and to the health" of the nation.[117] As a "national extravagance," liquor was sufficiently in demand that a tax on it could raise revenue, but the nation was not so dependent on it that it could not tolerate a modest tax. Thus the genius of the people was compatible, Publius thought, with such an excise[118]—a criterion he explicitly contemplates when writing that "excises

116. Fed. No. 12, p. 78.

117. Fed. No. 12, p. 78.

118. Publius' conjecture here was likely off base. In 1791, Congress enacted its first excise tax on domestic products. Like Publius' proposal, this tax was assessed on distilled spirits by the gallon, although the tax rate appears to have ranged from 9 cents per gallon to 40 cents per gallon, depending primarily upon the strength of the liquor. At the time, an average day's wage was about 25 cents, so the tax roughly amounted to one day's wages per gallon. Cynthia L. Krom & Stephanie Krom, *The Whiskey Tax of 1791 and the Consequent Insurrection: "A Wicked and Happy Tumult*," 40 ACCOUNTING

must be confined within a narrow compass," because "[t]he genius of the people will ill brook the inquisitive and peremptory spirit" of such taxes. Similar uses of the word "genius" can be found in Numbers 22,[119] 55,[120] 60,[121] and 63.[122]

Secondary literature on Publius' understanding of the "genius" of the American people is surprisingly thin,[123] however Garry Wills' *Explaining America* contains a short

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HISTORIANS J. 91, 96-97 (2013). The Whiskey Tax hit the farmers of Western Pennsylvania especially hard. Having been excluded from the Mississippi, farmers could not easily transport grain, and were forced to use it for whiskey. This appeared to create two economic problems: (1) the Whiskey Tax ate into these farmers' per-gallon profits, which were already low to due to shipping costs; (2) it overly burdened the local economy in Western Pennsylvania, which functioned off the barter system, and used whiskey as a basic currency. Krom and Krom suggest on this basis that the Whiskey Tax functioned largely as the nation's first income tax, at least vis-à-vis Western Pennsylvania. Krom & Krom, *The Whiskey Tax of 1791*, at 97-101. Eventually, many Pennsylvanians burdened by the tax took up arms and rebelled, leading to the need for then-President Washington to call for the militia and put down the rebellion.

119. Fed. No. 22, p. 137 ("the genius of the people of this country might never permit this description to be strictly applicable to use") (referring to the poor interactions among German states, which rendered navigable bodies of water "almost useless").

120. Fed. No. 55, p. 375-76. The context here is whether a 65-member House of Representatives is safe for a free nation. Publius responds that he could not "give a negative answer to this question, without first obliterating every impression which I have received with regard to the present genius of the people of America, the spirit, which actuates the state legislatures, and the principles which are incorporated with the political character of every class of citizens."

121. Fed. No. 60, p. 404 ("There is sufficient diversity in the state of property, in the genius, manners, and habits of the people of the different parts of the union to occasion a material diversity of disposition in their representatives").

122. Fed. No. 63, p. 426 (explaining that hereditary institutions are not only "unfit for … imitation," but also "repugnant to the genius of America," which is to say hereditary institutions chafe against the spirit of republicanism).

123. For example, a recent collection of essays by leading scholars of *The Federalist* includes no sustained discussion of genius. *See* THE CAMBRIDGE COMPANION TO THE FEDERALIST (Jack N. Rakove & Colleen A. Sheehan 2020). By my count, the 16 essays in the volume raise "genius" 26 times, mostly in citations to *The Federalist*, not for the purpose of examining the concept. One notable exception is Paul A. Rahe's essay, which notes that: "By the 1780s, the newly independent nation's genius had become, as the greatest American admirers of Britain's constitution readily admitted, republican." Paul

chapter on genius that roughly confirms the hypothesis that genius is spirit or culture. According to Wills, Publius inherited the term largely from Montesquieu and Hume.[124] Early in his career, Montesquieu had drafted an essay, *De la différence des génies* ("On the difference of geniuses"; *génies* is of course a cognate of "genius"), which is now lost. But Wills supposes that some of that essay's themes worked their way into *The Spirit of the Laws*—Montesquieu "divided the factors forming a national spirit into the physical and the moral," and included among the latter are categories like "religion, legal standards, historical ideals, customs, [and] manners," with the purpose of legislation being to "frame laws that suit the spirit of the particular people."[125] Wills points out a number of locations where Montesquieu gives specificity to the idea that laws and governments must conform to the people's pre-established character—even if Montesquieu does not use the word *génie* there. Most striking for our purposes is Book XIII, where Montesquieu claims that "[n]othing requires more wisdom and prudence" than the creation and levying of taxes[126]—a claim that fits quite well with the passage we just covered from Number 35. For his part, Hume acknowledged that some British monarchs (Wills says Charles I and James II) had "mistook the nature of the constitution, at least, the genius of the people,"

A. Rahe, *Montesquieu, Hume, Adam Smith, and the Philosophical Perspective of* The Federalist, in THE CAMBRIDGE COMPANION TO THE FEDERALIST, 234. William Treanor's article employs "genius" in its title, however his introduction makes clear that this complies with the modern usage of the term, not Publius': "Hamilton's conception of the judicial role in the federal system and his vision of the law reflected an insight and an intellectual power that can fairly be described as genius." William M. Treanor, *The Genius of Hamilton and the Birth of the Modern Theory of the Judiciary*, in THE CAMBRIDGE COMPANION TO THE FEDERALIST, 464, 466.

124. WILLS, *supra* Introduction, note 25, at 179-184.

125. *Id.* at 179.

126. MONTESQUIEU, SPIRIT OF THE LAWS, XIII.1; WILLS, *supra* Introduction, note 25, at 181.

and thus were overthrown.[127] More similar to the legislator, Hume suggested that orators should conform their speeches to the "particular genius, interest, opinions, passions, and prejudices" of their audience.[128]

It appears that Publius is in basic agreement with Hume, Montesquieu, and his contemporaries in asserting that the laws and government of a community must conform to that community's "genius." This is why Publius and his contemporaries are also fond of speaking in terms of the "genius" of government—in Number 83, Publius refers to the "general genius of a government."[129] The thought is this: if the genius of the government and the genius of the people do not sufficiently match, the people will attempt to replace their government. The question, now, is what is the actual spirit of the American people such that only a strictly republican form of government is compatible with it?

One convenient answer is that the genius of the people simply *is* the genius of republicanism. That is, this answer would maintain that the spirit and character of the people and their customs demands complete participation in politics and thus strict republicanism. While it may go too far to say that such an answer is wrong, it does not suffice to answer the main question in at least two ways. First, it leaves out too many specifics about the genius of the American people and the genius of republicanism to in fact identify them with one another. In other words, it does not say with much specificity *what* the genius of the people is such that it can properly be called republican. Second,

127. DAVID HUME, ESSAYS MORAL, POLITICAL, AND LITERARY, Part II, Essay XV ("On the Protestant Succession") (Eugene F. Miller ed. 1987), available at https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/704/0059_Bk.pdf.

128. *Id.* at Part I, Essay XXIII ("On the Standard of Taste").

129. Fed. No. 83, p. 574.

there is textual evidence to suggest that Publius does not think the genius of the people is republican simpliciter. Recall the understanding of republicanism articulated in Number 37, which Peterson understood as the *Anti-Federalists'* view of republicanism. According to that passage, a regime is a republic only if it (1) derives power from the people, (2) that tenures of office should be short, and (3) that offices should not be entrusted to individuals, but rather to multiple people. This understanding of republicanism, we noticed, differed from the decisive definition of republicanism offered in Number 39, which permits indirect election, long terms of office such good behavior, and offices held by a single individual. This difference is critical because Publius prefaces the definition in Number 37 by calling it "the genius of Republican liberty."[130] The difficulty is this: The regime that Publius offers to the American people, which he says in Number 39 is reconcilable with their genius, may be incompatible with the demands of "the genius of republican liberty." A regime compatible with the people's genius is not compatible with the genius of republicanism; consequently, there is reason to think that there is some kind of mismatch between the genius of the people and the genius of republicanism. We could find a way around this inconvenient conclusion by noting that Number 37 refers to the "genius of republican liberty," which could be distinct from the "genius of republics."[131] Moreover, Publius says that the genius of republican liberty only "seems" to require not only deriving power from the people, but short terms of office, and multiple officers, thus the genius of republican liberty may *in fact* depart from that

130. Fed. No. 37, p. 234.

131. Fed. No. 6, p. 31.

understanding. While such arguments could push the geniuses of the people and republicanism closer together, such arguments are more speculative than conclusive.

It may be better to start off with what we already know. As we have observed, and as Wills' chapter makes clear, *The Federalist* is committed to the idea that there must be a sufficient correspondence or "fit" between the genius of the people and the genius of the government. We also know that, at the moment in which Publius is writing, there were governments to which the American people were largely amenable despite some important reservations: the state governments. (Even though Publius points to dissatisfaction with the state governments on the ground that they were *too* popular,[132] the political crises of the late 1780s were generally thought to consist in altering the Articles of Confederation, not the state constitutions. At the very least, the genius of the American people was, on the whole, better fitted with the state governments than with the Articles. Similar evidence could be extracted from the fact of the Revolution itself, which may suggest the incompatibility of the people's genius with the British regime.) The genius of the American people, then, can be brought into clearer focus by looking at the genius of the state governments. To be sure, Publius is quite aware that the genius of a people in a particular state may depart from the genius of the American people as a whole—that claim is an assumption of the famous argument in Number 10 and, moreover, is stated explicitly in Number 60: "There is sufficient diversity in the state of

132. Fed. No. 10, p. 57 ("The valuable improvements made by the American Constitutions on the popular models, both ancient and modern, cannot certainly be too much admired; but it would be an unwarrantable partiality, to contend that they have effectively obviated the danger [of faction] on this side as was wished and expected.").

property, in the genius, manners, and habits of the people of the different parts of the union."[133]

But, on the whole, a general view of the state governments might give rise to an understanding of their genius, and thus of the genius of the people as a whole. This appears to be what Publius has in mind when he makes the case for the presidential veto in Number 73. Some object that, though the veto is good insofar as it prevents the enactment of bad laws, it is bad insofar as it prevents the enactment of good laws. Publius writes that the state experience—indeed, the deficiencies of many state governments—suggest why the presidential veto is a feature, not a bug.

> But this objection will have little weight with those who can properly estimate the mischievous of that inconstancy and mutability in the laws, *which form the greatest blemish in the character and genius of our governments*. They will consider every institution calculated to restrain the excess of law-making, and to keep things in the same state, in which they may happen to be at any given period, as much more likely to do good than harm; because it is favorable to greater stability in the system of legislation. The injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones.[134]

We should not be distracted by the fact that this passage regards energy in government, rather than republicanism. The core point is that, on the whole, "our governments"—by which Publius apparently means the state governments—are too flexible, which entails a deficiency in administration. The collective genius of the state governments therefore could be improved, at least from the perspective of energy. But notice that Publius does not object on the grounds that the genius of the state governments here is incongruous

133. Fed. No. 60, p. 404.

134. Fed. No. 73, p. 496 (emphasis added).

with the genius of the people—i.e., that there is some mismatch between the people and the regime. On the analysis provided here, it may be the case that the genius of the people is willing to brook some poor administration in exchange for the ability to more readily change the law. Similarly, Publius' analysis does not foreclose that possibility that the recommendation he urges—make laws harder to change, leading to slightly less republicanism and more stability—will be reconcilable with the genius of the people.[135] The goal is not so much to find the perfect tailoring between the regime and the genius of the people, so much as it is to find the regime that provides the best administration, that pursues the public good, yet remains compatible with the spirit, customs, and attitudes of the people.

This line of thought might explain why Publius relies so heavily on state constitutions in Number 39 when seeking to prove the republican character of the Constitution's institutions. The method of selection as well as the tenure of each office under the national government is compared to an office under a state constitution with a

135. An analogy might be made here to taxation. As we saw, Publius views the logic of genius as finding one of its main applications in the domain of taxation. The genius of the American people is not especially amenable to excise taxation. Fed. No. 12, p. 75. Yet Publius proposes an excise tax on liquor at one shilling per gallon, and he evidently thought this was compatible with the genius of the people, or else he would not have supported the proposal. Would Publius have thought that a tax of one shilling and one penny per gallon was inconsistent with the genius of the people? Likely not. But there is no doubting that, at a certain point, the tax becomes too burdensome, and the people will resist—as they evidently did in the Whiskey Rebellion. We can think of the veto issue in the same way. A higher law that regulates ordinary lawmaking will describe a procedure for making law, and the details of those procedures will make it more or less difficult to change the law. Making the law slightly harder to change, as Publius suggests, might be akin to raising taxes one penny. One penny might be imperceptible to the people, and thus not burden them too much. But at a certain point, the schema becomes incompatible with their genius.

similar character, although there are three lacunae in Publius' comparison.[136] The first two—failing to find a state parallel for the direct election of members of the House and failing to find a state parallel for the appointment of administrative officers—might be forgiven as obvious. The more troubling omission regards life tenure for judges under Article III, a topic about which Publius simply remarks it "unquestionably ought to be, that of good behaviour." Publius closes the loop in Number 78, noting that "all the judges who may be appointed by the United States are to hold their offices *during good behaviour*, which is conformable to the most approved of the state constitutions; and among the rest, to that of [New York]."[137]

The effect of relying on the genius of the people to justify popular government is therefore not to give a comprehensive account of the spirit, customs, mores, and culture of the American people and only *then* to argue that it supports strictly republican government. It is sufficient for Publius to canvas the states governments, governments that the crisis of the ineffectual Articles of Confederation have amazingly not drawn

136. The president's method of selection is said to be indirect, as it is in many states; the president serves for four years, whereas the executives in Delaware and New York serve for three. But the president is impeachable while in office, which is not true in every state. The Senate's method of selection is like that of the legislature in Maryland; senators serve for six years, but senators from Maryland serve for five years, and senators from New York and Virginia serve for five. The members of the House of Representatives are directly elected, although no state comparison is provided; Congressmen serve for two years, which is compared to the legislature in South Carolina. Federal judges are selected "as in the several States" by a "remote choice of the people." Publius even goes so far as to say that administrative officers will serve for tenures created by Congress, which will be "conformabl[e] to the reason of the case, and the example of the State Constitutions." Fed. No. 39, p. 253.

137. Fed. No. 78, p. 522. The New York Constitution of 1777 contained a provision stating that the judges of the supreme court, as well as the "first judge" of each county court may stay in their office "during good behavior or until they shall have respectively attained the age of sixty years." N.Y. CONST. art. XXIV (1777), available at https://avalon.law.yale.edu/18th_century/ny01.asp.

seriously into question. Publius' survey shows that some institutions would be beyond the pale—the hereditary senates of Sparta, Rome, and Carthage are "repugnant to the genius of America" because America has no noblemen and indeed hates the very concept of aristocracy. But more importantly, the *states'* own conformity to the principles of true republicanism in combination with the conformity of the genius of the state constitutions with the genius of the people presents strong evidence that any institution departing from the republican character cannot justifiably be incorporated into the national government.

* * *

This chapter has endeavored to describe Publius' account of republicanism generally and on what basis he can assert that the Constitution of 1787 is strictly republican. It also provides some detail regarding Publius' arguments for a strictly republican government. It should be said that these arguments should not be made too precise, either on their own or in relation to one another. Publius tells us only that a government that "depart[s] from the republican character" is "no longer defensible."[138] But Publius never endeavors to give us a clear and decisive answer as to why this indefensibility arises. He offers three justifications for strict republicanism, yet each of these justifications is somewhat indeterminate in its own right. *The Federalist* does not endeavor to be a treatise on man's nature, or a history of the Revolution, or a survey of the ethos of the American people. And perhaps more importantly, Publius says little about the relationship between these three justifications. Human nature, the Revolution, and the genius of the American people might be thought to be subsets of each other, with human nature describing the most abstract, universal basis on which to rest

138. Fed. No. 39, p. 250.

republicanism and the genius of the people being the most concrete and contingent basis. But what if things were different? What if the genius of the American people *had* been able to tolerate non-republican institutions? Would the British regime then be defensible, or would the honor bound up with human nature be a sufficient justification for strict republicanism?

It remains worthwhile to point out some similarities between the three justifications. Human nature suggests that men desire to rule—or at least to have some control over those who do. And this is especially true when their opinion has already been solicited—rejecting their opinion is risky business indeed. The Revolution aspired to create a union, and therefore might be said to have aspired to actualize this crucial feature of human nature. That is, the Revolution asserted the primacy of the American union, and thus the value of the union's ability to rule itself, both in the act of independence and on a continuing basis, and in so doing carried out the project of self-government. And the genius of the people appears to be that it is accustomed to strict self-rule; the origin of this spirit is uncertain—did it arise before the Revolution, or is it something that the state constitutions, drafted amidst the bloodshed, made durable? In any event, Publius' claim is that it would be foolish to resist that genius, a genius which is evidently compatible with human nature and the Revolution. Publius may be providing three distinct justifications, each of which can support the claim for strict republicanism alone. But the case for republicanism is secured by the fact that each of these justifications coincide in the American people.

CHAPTER 2: THE PROBLEM OF POPULAR RULE

In Chapter 1, we sought to understand on what grounds Publius demands a strictly republican government for the United States. In this Chapter, we examine the other side of the coin: If only a strictly republican government is tolerable, how can republicanism be transformed into a concrete plan for government? To restate this in a way more suited to the project undertaken by *The Federalist*, on what basis does Publius justify the republican institutions proposed by the Constitution of 1787 over and against different types or combinations of republican institutions?

Unlike the justifications for republicanism, which were largely theoretical and moral, the project of actualizing republicanism is historical and experiential. In his comprehensive work on the philosophical foundations of *The Federalist*, Morton White observed that Publius embraces a general distinction between "ethical knowledge" and "experimental knowledge."[1] According to the former, "moral statements," such as those about natural rights, are "supported either by … saying that they [are] self-evident truths or by … saying that they [are] deducible from such truths."[2] In contrast, experimental knowledge encompasses politics and psychology (and some other disciplines) and requires justification by experience or history.[3] Thus Publius' understanding of

1. WHITE, *supra* Introduction, note 25, at 194. The distinction bears a similarity to Hume's distinction between "relations of ideas" and "matters of fact." Relations of ideas are propositions that are "either intuitively or demonstratively certain," such as the Pythagorean theorem. In contrast, matters of fact are grounded in the "present testimony of our senses"—experience. *See* DAVID HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING, § IV.I, 15-16 (Eric Steinberg ed. 1977).

2. *Id.* at 195.

3. *Id.*

republicanism might appear closer to ethical knowledge: He does not provide much argument as to why republicanism should be defined as it is in Number 39—he asserts it. Publius denigrates those who define republicanism on the basis of experience; republicanism is instead defined in reference to certain moral priors—and deductions from those priors—which could not be gathered from experience. In contrast, the *justifications* for republicanism are in part ethical and in part experimental. Certain elements of each of the three justifications, such as obstinacy and the genius of the people, clearly derive from empirical observation.[4] But other factors, such as the worth of self-rule, might derive from self-evident truths. In this chapter we move away from the definition of republicanism (entirely ethical), its justifications (partly ethical and partly empirical), and move towards the purely practical question of how to actualize a strictly republican regime (entirely empirical).

Experience suggests, however, that holding institutions to a strict standard of republicanism, as the Anti-Federalists do, raises numerous difficulties. In the first place, republicanism stands in tension with energy—that is, the "quantity of power necessary to the accomplishment" of certain political tasks, such as defense and coordination among subsidiary members.[5] Explaining how the Constitution balances republicanism with energy is one of the main themes of *The Federalist*.[6] But even assuming that a proper

4. On the relation between experimental knowledge and empiricism, see *id.* at 197.

5. Fed. No. 23, p. 146.

6. Fed. No. 1, p. 5 ("An enlightened zeal for the energy and efficiency of government will be stigmatized … An over-scrupulous jealousy of danger to the rights of the people … will be represented as mere pretence and artifice"); Fed. No. 37, p. 233 ("Among the difficulties encountered by the Convention, a very important one must have lain, in combining the requisite stability and energy in Government, with the inviolable attention due to liberty, and to the Republican form").

balance can be struck, Publius acknowledges that *popular government* is beset by stubborn problems that must be remedied before a popular government is safe. Because republican government is a species within the genus of popular government, republican government is susceptible to the very same "dangerous propensities" as other types of popular government.[7] Publius does not maintain that he is the first to recognize these propensities; in fact, he notes that many with "enlightened view[s]"[8] have attempted to solve the problems that plague popular government and therewith republicanism.

This chapter is an attempt to trace Publius' thoughts on the subject of the fatal diseases that beset popular rule, diseases that threaten to undermine strictly republican government. The first question addressed is straightforward: What problems are coeval with popular rule? The chapter seeks to uncover this problem by examining Publius' account of democracy, a cousin to republicanism within the family of popular governments. When we examine Publius' discussion of democracy closely, both in Number 10 and elsewhere, we find democracy is most often condemned on the grounds that it places public decision making entirely into the hands of those who are personally affected by the outcomes of those public decisions. Publius summarizes this problem—a problem intimately tied up with his conversation of interest, passion, opinion, and reason, as well as his theory of motivation and action—by reference to the Roman law maxim *nemo iudex in sua causa,* "no one should be judge in his own cause." Democracies will tear themselves apart because every decision is at once public and private.

7. Fed. No. 49, p. 338 (complimenting Thomas Jefferson's *Notes on the State of Virginia*).
8. *Id.* at 338.

Second, this chapter provides an interpretation of *The Federalist* according to which Publius raises, investigates, and ultimately finds insufficient or unrepublican five possible solutions to the *nemo iudex* problem in the republican context. In other words, Publius is mindful that there exist earlier attempts to solve the *nemo iudex* problem. He concludes, however, that these attempts to make popular government safe do not suffice.

The first putative solution is simple representation, which is thought to avoid the *nemo iudex* problem because it provides some distance between those who make policy (the representatives) and those who are most susceptible to passionate rule (the people). But, Publius points out repeatedly, the problem that plagues democratic assemblies plagues *all* deliberative bodies, best evidenced by the objectionable doctrine of parliamentary sovereignty.

The second putative solution is the mixed regime, which takes two diverse forms. Classically, the mixed regime was understood as providing for fixed representation for pre-existing parts of society. Because such a regime would not comply with the republican form, Publius' discussion of a mixed form of government regards the proposal to provide fixed representation in the legislature for different economic interests, such as merchants. But this, too, would violate the demand for republican government.

Third is the separation of powers, which is thought to pit different representative institutions against one another. Here, the enforcement mechanism presents the problem: "parchment" separations are not sufficient to keep the powers apart, and the people, as evidenced by the argument in Numbers 49 and 50, are liable to resolve disputes between the branches based on passion and interest, not reason and the public good.

Fourth is the proposal for a confederation (*foedus*) of independent republics—a confederation. Publius contends that as a law only for states, not for individuals,

decisions of the confederation are distorted by the interests of the constituent states, thus violating *nemo iudex*.

Fifth and finally is the extended republic argument made most famously in Number 10, but elaborated in Numbers 9 and 51. It may be thought that this argument—often considered Publius' unique contribution to republican theory—solves the *nemo iudex* problem once and for all. But Publius recognizes that the argument has its limits, most clearly stating those limits in Number 37. While the extended sphere goes a long way to mitigating the *nemo iudex* problem, it by no means solves it.

Publius rejects each of these institutional designs as an adequate solution to the *nemo iudex* problem. Representation, the separation of powers, a confederacy of republics, and the extended sphere all fail to make judging in one's own cause a remote factor in politics; the mixed regime, by contrast, swings in the other direction, and compromises on republicanism. Publius is thus left in the position of demanding a strictly republican regime, while having no way to implement it reliably, a dilemma that constitutionalism is designed to solve, and which we reach in Chapter 3.

POPULAR RULE & THE *NEMO IUDEX* PROBLEM

Since Charles Beard's publication of *An Economic Interpretation of the Constitution of the United States* in 1913, a robust and unflagging line of scholarship has sought to understand *The Federalist* as being fundamentally opposed to popular government. Beard argued that *The Federalist* stated an economic argument for ratification and so frequently appealing to the pecuniary interests of its readership. But "above all," Beard said, Publius appeals "to the owners of personalty anxious to find a foil against the attacks of leveling democracy, that the authors of *The Federalist* address their most cogent arguments in favor

of ratification."[9] Although many major works on the political theory of *The Federalist* have debunked Beard's expansive claims, Beard's basic thesis—that Publius is fundamentally fearful of and thus an opponent of democracy—finds its own expressions today. Recently, Jeremy David Engels summarized *The Federalist* as "Americaniz[ing] *misodemia*"—as Americanizing the hatred of democracy.[10]

Notwithstanding the vitality of this line of thought, Martin Diamond to a large extent lowered the temperature of the debate by reminding scholars of the importance of keeping terms straight. According to Diamond, we are not entitled to assume that what Publius called democracy and what we call democracy are coterminous. The notion that the Founders (and Publius in particular) were hostile to democracy "has been fortified by the fact that they [i.e., the Founders] sometimes defined 'democracy' invidiously in comparison with 'republic'."[11] Publius appears to us as an anti-democrat because he

9. CHARLES BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES, 154 (1913).

10. Jeremy David Engels, *The Trouble with "Public Bodies": On the Anti-Democratic Rhetoric of* The Federalist, 18 RHETORIC & PUB. AFF. 505, 507 (2015). For an argument that emphasizes civic *health* as opposed to disease, *see* Thomas L. Pangle, The Federalist Papers' *Vision of Civil Health and the Tradition out of Which that Vision Converges*, 39 WESTERN POL. Q. 577 (1986). For a more comprehensive (and compelling) account of Publius' overall rhetorical style, *see* DAN T. COENEN, THE STORY OF THE FEDERALIST 32-46 (2007) (discussing the (1) personal circumstances of the local audience, (2) arguments from history, (3) practical reasoning, and (4) the need for compromise). Connor Ewing has recently reviewed what he calls *The Federalist*'s "proleptic" analysis of politics. Ewing's analysis, though not condescending like Engels', fits conceptually with that analysis because it emphasizes Publius' "normative evaluations of the perceived consequences of a proposed course of action" through a "vision of the future on the basis of which such evaluations can be made." Connor M. Ewing, *Publius' Proleptic Constitution*, AM. POL. SCI. R. (forthcoming 2023), manuscript page 4 (on file with author). The two analyses link up because the doctor metaphor elucidated by Engels depends upon the normative evaluation of the future results of present conduct. Whether to undertake a specific course of medical treatment depends largely on the normative evaluation of the future results of undertaking that treatment.

11. Martin Diamond, *Democracy and* The Federalist*: A Reconsideration of the Framers'*

distinguished between democracies and republics and argued, as we saw in Chapter 1, in favor of the latter. Diamond continues:

> For their [again, the Founders'] basic view was that popular government was the genus, and democracy and republic were two species of that genus of government. What distinguished popular government from other genera of government was that, in it, political authority is 'derived from the great body of the society, not from … [any] favored class of it.' With respect to this decisive question, of where political authority is lodged, democracy and republic—as The Federalist uses the terms—differ not in the least. Republics, equally with democracies, may claim to be wholly a form of popular government.[12]

The notion that democracies and republics are species within the same genus—popular government—has not entirely evaded attack.[13] For our purposes, however, Diamond's view presents a useful starting point. Engels is correct to note that Publius frequently speaks of political problems in the language of malady and disease. (Perhaps

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Intent, 53 AM. POL. SCI. REV. 52, 54 (1959).

12. *Id.*

13. Paul Eidelberg's *The Philosophy of the American Constitution: A Reinterpretation of the Intentions of the Founding Fathers* is dedicated to explaining that the American regime is the "Mixed Regime" in the classical sense. PAUL EIDELBERG, THE PHILOSOPHY OF THE AMERICAN CONSTITUTION: A REINTERPRETATION OF THE INTENTIONS OF THE FOUNDING FATHERS, 3 (1968). The reasons for including each provision in the Constitution, Eidelberg urges, varied across members of the convention, and certainly varied among those who, like Publius, sought to ensure the Constitution would be ratified. For this reason, Eidelberg believes it "unwise (and perhaps fallacious) to reduce the political character of the Constitution to any single formula, whether democratic, oligarchic, or aristocratic. But it may also be unwise to reduce to such formulas any of the institutions which the Constitution prescribes." *Id.* at 30. To the extent that Eidelberg's thesis applies to *The Federalist*, Publius' defense of republicanism would in effect be a defense of the mixed regime. As a result, republicanism would be a cousin to democracy—because the mixed regime/republicanism incorporates democratic elements—but the relationship would be a far cry from Diamond's formulation, according to which republics and democracies are variations of a theme. For an argument in favor of the superiority of Diamond's view over Eidelberg's, *see* Peterson, *supra* Chapter 1, note 9, at 57 -58. We will return to Eidelberg as a foil in the section of this chapter devoted to Publius' examination and critique of the mixed regime.

this is Publius' attempt to continue the ancient trope according to which knowledge of politics is analogized to other technical skills, such as medicine.) Diamond's invocation of the genus-species relationship is thus quite helpful: if republics and democracies are related species, then they may be vulnerable to the same diseases, just as closely related species of animals are often vulnerable to the same diseases. Publius' task—to inoculate the American republic against the "diseases most incident to republican government"—is based on the hypothesis that such diseases derive from republicanism's character as a popular government. Democracies, likewise a species of popular government, will be susceptible to the same diseases

Before turning to Publius' critique of democracy, one threshold question requires answering. Supposing that Publius' genuine view, following Diamond, is that republics and democracies are variations of popular government and thus their vices are related if not indistinguishable. Why should Publius' examination of the defects of republicanism begin with an examination of democracy? Wouldn't it have been better to proceed directly to the heart of the matter, that is, to an examination of the defects that republics experience specifically? Although Publius does not provide a straightforward answer, the answer may simply be that, in accordance with *The Federalist*'s insistence that the Constitution's project is new,[14] there are few (if any) strict republics that could serve as suitable historical examples. And although the defects of popular rule may be present in regimes that are only partly republican, such as the British government, the defects are possibly muted by aristocratic or monarchical institutions, and consequently are more difficult to observe and dissect. In short, the problems attending to popular government

14. *See* Fed. No. 14, p. 89.

are not easily examined by way of republican examples. Instead, such problems can be viewed through another form of popular rule—democracy—and only then asking how such problems could or would carry over to a strict republic.

How, then, do democracy and republics differ as species? In Chapter 1, we determined that the definition of republicanism provided in Number 39 likely is closest to Publius' true view, and it requires (1) that the government's power be derived from the great body of the people and (2) that officers serve during a specified term, during pleasure, or during good behavior.[15] This scheme, we said, is roughly equivalent to what Publius' teaching on representation requires.[16] To more fully bring into view the species-difference between these two regimes, we now need only look at democracy. Publius first introduces democracy in Number 10. There, he defines "a pure Democracy" as "a Society, consisting of a small number of citizens, who assemble and administer the Government in person."[17] Properly speaking, a democracy is a face-to-face society in which the citizens make communal decisions in common. Publius then immediately turns to how democracies differ from republics, stating two "great points of difference": first, a republic is built around "the delegation of the Government … to a small number of citizens elected by the rest," whereas a democracy contains no such delegation; second, a republic may be extended over a "greater number of citizens, and [a] greater sphere of country."[18] The latter point of difference is a consequence of the former. Small

15. Fed. No. 39, p. 251.

16. *See supra* Chapter I, p. 31 ff.; *see also* Fed. No. 10, p. 62 ("A Republic, by which I mean a Government in which the scheme of representation takes place").

17. Fed. No. 10, p. 61.

18. Fed. No. 10, p. 62.

democracies and small republics are presented as, depending upon one's view, equally workable or equally unworkable. But representation makes republics workable on a large scale, whereas democracies are confined to a small space. The essential point of difference regards citizens exercising power directly or indirectly: republics are popular governments in which "delegation" over self-government occurs, whereas in democracies there is a strict identity between rulers and ruled. Hence this discussion is placed immediately after Publius defines a republic as a "Government in which the scheme of representation takes place"; the existence of representation precludes a regime's classification as a democracy.

Publius' repeated use of the locution "pure Democracy" in Number 10 may raise the following uncertainty: In addition to "pure" democracies, are there regimes that qualify as democracies but are not pure ones? And, if so, in what way do "pure" democracies differ from what we might call "simple" democracies? This worry is a substantial one, because if Publius indeed has such a distinction in mind, then it would perhaps distort our account of popular government and its problems. Three reasons, however, might counsel against basing our reading of *The Federalist* upon a distinction between pure and simple democracies.

First, in one of the passages from Number 10 that we just briefly examined, Publius appears to use "Democracy" and "pure Democracy" interchangeably. Publius invites the reader to "examine the points in which [a republic] varies from *pure Democracy*," but changes the verbiage when he seeks to discuss the substantive differences: "[t]he two

great points of difference between a *Democracy* and a Republic are, first, the delegation of the Government, in the latter, to a small number of citizens elected by the rest."[19]

Second, the substantive difference between democracies and republics is repeated in Number 14, but "pure" democracies do not seem to arise.

> The error which limits Republican Government to a narrow district, has been unfolded and refuted in preceding papers. I remark here only, that it seems to owe its rise and prevalence, chiefly to the confounding of a republic with a democracy: And applying to the former reasonings drawn from the nature of the latter. The true distinction between these forms was also adverted to on a former occasion. It is, that in a democracy, the people meet and exercise the government in person; in a republic they assemble and administer it by their representatives and agents.[20]

The "former occasion" that Publius references here is the discussion in Number 10 of the difference between democracies and republics, an observation corroborated by Cooke[21] as well as the fact that Number 10 is the first and only mention of democracy before Number 14. Yet Publius here does not invoke "pure Democracy" as he did in Number 10, suggesting once again that "democracy" and "pure Democracy" are interchangeable terms.

The third reason requires us to follow this supposed distinction between pure and simple democracies. Later in *The Federalist*, in Number 48, democracies are understood to be a government in which "a multitude of people exercise in person the legislative functions," yet Publius also speaks of "their [that is, the people's] executive

19. Fed. No. 10, p. 62 (emphasis added).

20. Fed. No. 14, p. 83-84 (emphasis added).

21. *See* Fed. No. 14, p. 84 (editor's footnotes after "former occasion"; *see also* footnotes after "preceding papers," which references Numbers 9 and 10).

magistrates."[22] In this passage, the execution of the laws appears delegated to some subset of the citizenry—the magistrates—meaning that a popular government's status as a democracy turns only on whether the *legislative power* is delegated or not. (The judicial power is not mentioned.) Number 48's view of democracy—according to which the executive power may be delegated—sits uncomfortably with Number 10—according to which the citizens must "administer the Government in person" simply.[23] The ostensible distinction between a simple democracy (as described in Number 48) and a pure democracy (described in Number 10) therefore would draw on the separation of powers: In a pure democracy, the assembled citizens exercise all government powers, whereas in a simple democracy only the legislative power is so exercised. In support of this distinction, Publius' emphasis on pure democracy in Number 10 can be explained by the fact that the distinction between simple and pure democracies rests on an understanding of separated powers, yet the separation of powers is not raised in any substantial way until Number 47. In point of fact, however, Publius overrides the supposed distinction between simple and pure democracies in Number 63, saying that "In the *most pure democracies* of Greece, many of the executive functions were performed not by the people themselves, but by officers elected by the people, and *representing* the people in their *executive* capacity."[24] That is, these Greek democracies were pure democracies notwithstanding the fact that the executive function was delegated to magistrates. Not only does Number 63 eliminate any possibility that there may be a difference between

22. Fed. No. 48, p. 333.

23. Fed. No. 10, p. 83-84.

24. Fed. No. 63, p. 427 (emphasis added to "most pure democracies," but not to "representing" or to "executive").

"pure" and "simple" democracies, the reference to representation therein suggests that Publius' remark in Number 10 connecting representation to republicanism should be taken as applying primarily to legislative capacity. In a democracy, the people exercise the legislative function directly; in a republic, they do so by way of representation.

With Publius' general understanding of democracy in view, we now turn to its critique. The most immediate objection is that a genuine democracy is not a workable regime for the people of America: "[T]he natural limit of a democracy is that distance from the central point, which will permit the most remote citizens to assemble as often as their public functions demand; and will include no greater number…"[25] The thirteen states encompass too large a territory and too many citizens to assemble in person with any frequency. Democracy, rightly understood, is not choice-worthy precisely because its own inherent limitations make it incompatible with the American union—an aim that Publius understands to be among the final aims of the Constitution.

But more deeply, the problem of democracy is the problem of "judging in one's own cause"—a maxim Publius borrows from the Roman law maxim *nemo iudex in sua causa*.[26] To reach this conclusion we must briefly canvass the argument in Number 10,

25. Fed. No. 14, p. 85.

26. In this formulation, the maxim dates back to *Dr. Bonham's Case*, (1610) 77 Eng. Rep. 638 (C.P.) 652; 8 Co. Rep. 107a, 118a (Coke, C.J.), which addressed whether a board of physicians could be given the power to punish the unlicensed practice of medicine. Adrian Vermeule, however, notes that the *nemo iudex* idea finds its classical expression during the reign of Constantine, in Justinian's *Codex*: "*Ne quis in sua causa iudicet vel sibi jus dicat*" ("No one shall be judge in his own cause"). Adrian Vermeule, *Contra* Nemo Iudex in Sua Causa*: The Limits of Impartiality*, 122 YALE L.J. 384, 386 n.1 (2012) (citing Fred H. Blume, Annotated Justinian Code 3.5.1 (Timothy Kearley ed. 2d ed. 2008)). Vermeule continues on to note that there are in fact "multiple Latin tags whose content is more or less equivalent. These include *nemo debit esse iudex in propria causa* … and *nemo potest esse simul actor et iudex*." *Id.* at 390.

which is the essay that most deeply discusses democracy. Publius begins that Number by taking up the problem of faction—a problem he had addressed to some extent in Number 9.[27] Publius introduces the problem by saying that "the friend of popular governments, never finds himself so much alarmed for their character and fate, as when he contemplates their propensity to this dangerous vice."[28] Faction is portrayed as an affliction of *popular government*—it is a disease to which all species within the genus suffer. Publius, ever physical, warns that the disease is "mortal," that "popular governments have every where perished" from it.[29] The state governments, which are strictly republican, have made "valuable improvements" in combatting faction, yet it would be "an unwarrantable partiality" to "contend that they have as effectually obviated the danger … as was wished or expected."[30] Publius proposes two broad "methods of curing the mischiefs of faction": (1) "removing its causes," i.e., a genuine cure, or (2) "controling [*sic*] its effects," i.e., managing the symptoms.[31]

Eliminating the causes proves to be either inadvisable or unworkable. One "essential" prerequisite to faction is "liberty." Although liberty is not defined, from context it seems to be simply the ability to choose. If citizens have no choice in political affairs, then the formation of factions will be nugatory. Publius says this remedy would be "worse than the disease," because liberty is "essential to political life." Abolishing

27. Fed. No. 9, p. 54 ("the more immediate design of this Paper … is to illustrate the tendency of the Union to repress domestic faction and insurrection").

28. Fed. No. 10, p. 56.

29. Fed. No. 10, p. 57.

30. Fed. No. 10, p. 57.

31. Fed. No. 10, p. 58.

liberty is like "the annihilation of air."[32] A cure for faction, while possible, is unwise. The second possibility is to give "to every citizen the same opinions, the same passions, and the same interests."[33] Publius does not say this solution is unwise, only "impracticable." "So strong is this propensity of mankind to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions, and excite their most violent conflicts."[34]

Only then does Publius connect the causes of faction back to an explanation of faction's effects, which are pernicious. The general problem, which Publius elaborates at length, is *nemo iudex in sua causa*: "No man is allowed to be a judge in his own cause."[35]

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32. Fed. No. 10, p. 58.

33. Fed. No. 10, p. 58.

34. Fed. No. 10, p. 59. Edward Erler understands this passage as making oblique reference to both Rousseau and Plato. *See* Edward J. Erler, *The Problem of the Public Good in* The Federalist, 13 POLITY, 649, 658 (1981). Erler postulates that Publius understands both Rousseau and Plato as "theoretic politicians" who have sought to eradicate the tension between private and public. Rousseau, for his part, bases the public good on alienation, which Erler asserts corresponds to Publius' assimilation—the notion that all private interests could be reconciled through equal property rights. But for Publius the equalization of property rights can be done only by smothering men's personal faculties and capacities. Property equality would therefore obliterate liberty and constitute a cure worse than the disease. Rights arise from the diversity of faculties and the free use of those diverse faculties; the denial of rights would mean the eradication of free use of diverse faculties, since the diversity of faculties is a fact of nature. Plato, in *The Republic*, wished to ensure that the guardians—those entrusted with political rights—would be public spirited, specifically by forcing them to live in common and thus eliminated, within this class, different private interests that would give rise to faction. In the end, though, Erler finds some similarity between Plato and Publius, for in *The Republic* the public-spirited character of the guardians' decisions arises more from "the contrived absence of occasions for vice" rather actual virtue: "It might even be said that virtue is replaced by the institution of communism." *Id.* According to Erler, Publius makes a similar move, substituting the equipoise of rival factions for virtue. The difference, then, between *The Republic* and *The Federalist* is that only one is a "comic *reductio ad absurdum* demonstrating the limits of human political nature" and the other is "sober." *Id*. at 658-59.

35. Fed. No. 10, p. 59. Without support, Charles Kesler asserts that the "problem of

In a narrow sense, when a man is both litigant and judge, "his interest would certainly bias his judgment."[36] This is another instance of Publius' theory of action, according to which men will act when motive and opportunity coincide.[37] When a man is both judge and litigant, he has (as judge) the opportunity to act and (as litigant) a motive—in this case an interest in the case. His interest as litigant will adulterate the formation of a judgment, rather than forming the judgment solely on the basis of reasoning about justice and the public good, reason being the faculty upon which impartial judgment should be based.[38]

The core logic of *nemo iudex* applies "with greater reason" to "a body of men" acting in a collective capacity,[39] particularly when they legislate. Publius is compelled here to enlarge the narrow version of the *nemo iudex* principle in two respects: first, that the problem appears not just in the judicial context, but in the legislative context; and,

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faction in the legislature is the epitome of politics in general." Charles R. Kesler, Federalist *10 and American Republicanism*, in SAVING THE REVOLUTION: THE FEDERALIST PAPERS AND THE AMERICAN FOUNDING 31 (Charles R. Kesler ed. 1987). Although Publius' analysis here takes place in the legislative context, the balance of this chapter shows that the problem of judging in one's own cause is a problem to which Publius pays respect throughout his political theory.

36. Fed. No. 10, p. 59. For an extended meditation on the origin and scope of Publius' concept of "interest," *see* Eugene F. Miller, *What Publius Says About Interest*, 19 POL. SCI. REVIEWER 11 (1990).

37. *See supra* Chapter 1, note 74 and text.

38. Presumably decisions should be based on reason because such decisions respect the intrinsic rights of all human beings. Reason thus serves private rights and the public good. For an analysis of the relationship between reason and rights (i.e., liberalism), *see* Maynard Smith, *Reason, Passion and Political Freedom in* The Federalist, 22 J. POL. 525 (1960).

39. Fed. No. 10, p. 59.

second, the problem appears not only when a single man's interests are implicated, but when a group's are.

First, as narrowly construed, the principle applies when a litigant *sits in judgment*. But Publius rhetorically asks: "[W]hat are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens?"[40] A considerable portion of legislation is akin to the judicial act of entering an order that binds the parties,[41] a claim whose general thrust is in line with Number 37, which claims that "no skill in the science of Government has yet been able to discriminate and define, with sufficient certainty, its three great provinces, the Legislative, Executive, and Judiciary."[42] Conflating the legislative function with the judicial has a side-effect. Legislators, by virtue of their office, become "advocates and parties to the causes which they determine."[43] The decisions

40. Fed. No. 10, p. 59.

41. Though Publius says little else on this point, it invites further explanation. Publius may mean that bias compromises the legitimate exercise of government power whether that power be legislative or executive in character. But more light can be shed on Publius' remark by noting that "Adjudication and judicial power are very different things. Adjudication is procedure; it's just a *method* of making decisions. Power is substance; it's what gives someone the *authority* to decide. Much of the confusion of non-Article III adjudication comes from a lack of attention to power. Courts usually exercise their judicial power through adjudication, so when another entity adjudicates, it might seem to exercise judicial power." William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1520 (2020). When Publius says that legislatures are engaged in the act of judging, he does not mean that they are engaging in adjudication per se; legislative assemblies in a democracy are not, in Baude's words, holding "contested adversary hearings between champions" of each position. *Id.* Instead, they are engaged in an activity similar to the judicial power, which results in consequences that are binding upon the parties.

42. Fed. No. 37, p. 235.

43. Fed. No. 10, p. 59. One is reminded here of Socrates's jurors, whose sons Socrates's behavior threatened to corrupt. Although we do not know the identity of Socrates's jurors, Diogenes Laërtius suggests that the jury numbered 501. 1 DIOGENES LAËRTIUS,

legislators make as part of the public body implicate both their own personal private concerns as well as the private concerns of the constituents for whom they advocate. Publius explains that taxation is the legislative act in which there is the greatest "opportunity and temptation" for abuse. The private interest of the legislators are always implicated by tax legislation, for "[e]very shilling with which they over-burden" some other citizen "is a shilling saved to their own pockets."[44]

The second alteration that this move makes is to expand the problem from a single individual judging (or legislating) with his own interests at stake to a *group* judging (or legislating) with their interests at stake. This is where faction as such enters. As Publius had explained in Number 10, men can be "united and actuated," coalescing into a group, so long as there is a germ of commonality between them. This germ can be "some common impulse of passion, or of interest."[45] To be sure, not all groups are factions—the passion or interest around which the group coalesces must adversely affect the private rights of others or the public good that reason suggests. But the central point is that when a faction is organized around a shared interest or passion, that interest or passion forms

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LIVES OF THE EMINENT PHILOSOPHERS, II.41 (Robert Drew Hicks tr. 1925), https://penelope.uchicago.edu/Thayer/E/Roman/Texts/Diogenes_Laertius/Lives_of_the_Eminent_Philosophers/2/Socrates*.html (stating that Socrates was convicted by 281 votes; in his *Apology*, Plato states that a swing of thirty-one votes would have saved Socrates, meaning 220 voted to acquit). Given a jury of this size and Socrates's influence on the young men of Athens, it stands to reason that the sons of some jurors had fallen into Socrates's orbit, just as the son of Anytus—one of Socrates's accusers—had. *See* XENOPHON, APOLOGY OF SOCRATES, § 30, in 4 XENOPHON IN 7 VOLUMES, http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0212%3Atext%3DApol.%3Asection%3D30, (Socrates describing a "brief association" with Anytus's son and encouraging the young man not to follow in his father's trade).

44. Fed. No. 10, p. 60.

45. Fed. No. 10, p. 57.

a common opinion, which the faction pursues at the expense of reason. Here, too, motive combined with opportunity yields a disastrous result.[46]

Consequently, Publius' final recommendation is that "relief" from faction "is only to be sought in the means of controlling its effects." Publius proposes two ways to control faction—(1) prevent factious majorities from forming in the first place or (2) if factious majorities indeed form, render them "unable to concert and carry into effect schemes of oppression."[47] Democracy's insistence on the citizenry legislating without mediation is at odds with efforts to control faction.

> [I]t may be concluded, that a pure Democracy … can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert results from the form of Government itself; and there is nothing to check the inducement to sacrifice the weaker party, or an obnoxious individual. Hence it is, that such Democracies have ever been the spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property; and have in general been as short in their lives, as they have been violent in their deaths. Theoretic politicians, who have patronized this species of Government, have erroneously supposed, that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions.[48]

Democracies, like all popular governments, cannot be entirely inoculated against faction—the causes of faction cannot or should not be removed. Democracies will foster coalitions of citizens, who group themselves around a common passion or interest; these

46. For a discussion of the public good's relationship to justice, *see* W.B. Allen, *Justice and the General Good:* Federalist *51*, in in SAVING THE REVOLUTION: THE FEDERALIST PAPERS AND THE AMERICAN FOUNDING (Charles R. Kesler, ed.) (1987).

47. Fed. No. 10, p. 61.

48. Fed. No. 10, p. 61-62.

passionate or interested opinions will be given voice in the legislature, and public policy will risk being based on those passions or interests, not on reason. The danger of faction here remains allowing these groups of citizens to legislate to their own benefit—a clear violation of *nemo iudex.* And unlike republics, democracies will remain vulnerable to factions, because their small size prevents them from "controling" the effects of faction as Publius urges. Democracies are geographically too small, meaning the variety of interests across the citizenry will have a narrower scope, and it will be difficult to prevent factions from becoming majorities. Meanwhile, that all the citizens gather together at one time to exercise the legislative power provides no room to wedge-in institutions that can prevent a majority faction from "carry[ing] into effect schemes of oppression."[49] Democracies are doomed to suffer from faction because they cannot escape the *nemo iudex* problem.

Diamond has noted that for Publius "[f]action is … *the* problem of popular government."[50] This is to say that the problem we have just canvassed is a threat in all popular regimes—even non-democracies—although not all popular regimes can accommodate the same solutions. Yet Diamond immediately qualifies that the problem, as presented by Publius, is not faction in general but rather majority faction.[51] This

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49. Fed. No. 10, p. 61.

50. Diamond, *supra* note ___, at 64 (emphasis in original); *see also* Alan Gibson, *Madison's Republican Remedy: The Tenth* Federalist *and the Creation of an Impartial Republic*, in THE CAMBRIDGE COMPANION TO THE FEDERALIST 274 (Jack N. Rakove & Colleen A. Sheehan eds. 2020) ("Madison's 'great desideratum' pointed to both a general problem face by all governments and the specific manifestation of that problem in republican governments.").

51. *Id.* ("Now it must be made clear that Madison, the author of this essay, was not here really concerned with the problem of faction generally"). It should be noted, however, that Numbers 9 and 10 open with references to different vices of popular rule: the

observation points once again to the *nemo iudex* problem. The *nemo iudex* problem surfaces only when a litigant is put into the position to judge his case or, as Publius extends it, to legislate over his own case. Once groups are introduced into the scheme, the threat of bias only arises when the group *qua* litigant is given the opportunity to legislate or judge. The crucial condition for faction to work its harms is that the factious group amount to a majority of the legislature. Unless several minority factions are capable of forming a majority coalition, such factions have no opportunity to judge or legislate in their own cause, even though they certainly would do so given the opportunity. *Pace* Diamond, we might reformulate his claim in the following way: The problem of judging in one's own cause—which in a republic can be done only by a majority—is *the* problem of popular government.

The remainder of this chapter focuses on possible solutions to the *nemo iudex* problem. Publius is aware, as he makes clear in Number 10, that he is not the first to recognize the problem and that various solutions have been proposed and even tested. Indeed, one of Publius' own concepts—the extended republic, is designed to be a partial solution to the *nemo iudex* problem, but even he acknowledges it is importantly limited in its application. Thus we take up each of these given possible solutions, explaining the best case that it solves the *nemo iudex* problem, and finally concluding why Publius finds each one insufficient.

"perpetual vibration, between the extremes of tyranny and anarchy," Fed. No. 9, p. 50, and "instability, injustice, and confusion," Fed. No. 10, p. 56. But the relationship of these vices to faction is not evident—they may be coterminous with or related to the vice of faction.

SIMPLE REPRESENTATION

The first putative solution to the *nemo iudex* problem is representation. (I use the term "simple representation" so as to avoid confusing representation and institutions with which it is entwined in the American regime, especially the separation of powers and federalism.) Democracy, insofar as it describes a regime in which the citizenry exercises the legislative power in person, can be reformed so that representatives exercise that power on the citizens' behalf. Introducing simple representation to the legislature—the institution where the people are most capable of ruling directly—carries the regime out of the category of democracies and into the category of republics, although it remains within the genus of "popular government" more broadly. And, of course, if the other features of the regime are popularly sourced, then the regime can even be termed a "strict" republic, as described in Number 39.

In order to see how representation is thought to solve the *nemo index* problem, it is first necessary to briefly examine Publius' theory of representation—one of the most important theoretical contributions of *The Federalist*.[52] Publius includes "the representation of the people in the legislature by deputies of their own election" among the number of principles that have benefited from the "great improvement" in the contemporary "science of politics."[53] Representation was only "imperfectly known"[54] to the ancients, meaning most ancient popular governments were "of the democratic

52. *See* Judith N. Shklar, The Federalist *as Myth* (Reviewing WILLS, *supra* Introduction, note 25), 90 YALE L.J. 942 (1981) ("Representation is the most important of all topics discussed in *The Federalist*").

53. Fed. No. 9, p. 51.

54. Fed. No. 52, p. 355.

species."[55] Thus, although representation was not per se discovered by modern politicians or political thinkers, Americans nevertheless "owe the great principle of representation" to "modern Europe."[56] The object of representation is to provide a "substitute for a meeting of the citizens in person."[57] Such a substitution requires that the representatives have an "immediate dependence" upon the people as well as an "intimate sympathy" with their own opinions.[58] "Frequent elections" (and thus possibility of being *re*elected) are "unquestionably the only policy by which this dependence and sympathy can be effectually secured."[59] We might call this formulation of representation the classical view of representation. In its basic terms, that view understands the representative body as a microcosm of the citizenry; the representatives should aim at making decisions that parallel, as closely as possible, the decisions that a hypothetical democratic legislature would make. Representation surfaces primarily to relieve citizens of the quotidian burdens of legislating in person.

Although Publius embraces the classical conception of representation to an extent, he improves upon it dramatically. Representation is no longer a simple conduit between the views of the constituents and the legislature; that is, representation is not just a matter of convenience, an innovation that makes the assembly of all the citizens in one place unnecessary. Instead, representation retains the regime's popular character while aiming to mute the *nemo iudex* problem, which was said to plague all popular governments, but

55. Fed. No. 14, p. 84.
56. Fed. No. 14, p. 84.
57. Fed. No. 52, p. 355.
58. Fed. No. 52, p. 355.
59. Fed. No. 52, p. 355.

democracies especially so. Delegating the government to "a small number of citizens elected by the rest" has the effect of "refin[ing] and enlarg[ing]" the public views.[60] The representatives, collectively, are a "medium" through which the popular will is discerned, but the fact of their election suggests a "wisdom" through which they can "best discern the true interest of their country."[61] Representatives are, in sum, more likely to be citizens whose "patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations."[62] It is more likely, therefore, that "the public voice, pronounced by the representatives of the people, will be more consonant to the public good, than if pronounced by the people themselves convened for the purpose."[63] Publius concedes that representatives will ideally be motivated by interest, but he hopes that that interest will be "the true interest of the country," not private interest. Although Publius does not contend that representation by way of election will guarantee wise representatives, the thought here is clear: Representation affords the possibility of better rulers, those who are able to decide on the basis of reason, not on the basis of their personal interests or passions. Through love of country and justice, representatives will not let their passion or interest dominate their reason.

This account of representation also explains Publius' view that elections are integral to republican rule, rather than sortition, which ancient thinkers had considered to be essential to popular government.[64] Sortition merely samples the people—it is

60. Fed. No. 10, p. 62.

61. Fed. No. 10, p. 62.

62. Fed. No. 10, p. 62.

63. Fed. No. 10, p. 62.

64. In his discussion of the sixth and elusive form of rule, *politeia*, Aristotle remarks that "it is held to be democratic for offices to be chosen by lot, oligarchic to have them

democracy in miniature—and thus provides no increased probability that the delegates are the sorts of people who can conquer their short-term interests, passions, or biases in order to discern the public good. Representation, in contrast to mere delegation, presents the people with a different question: Whereas delegation asks the people what policies to enact, representation asks them which fellow citizens are wisest and most capable of a "complete execution of the trusts for which [they are] responsible."[65] Representation is thought to remedy the *nemo iudex* problem because it provides distance between the passions of the people and the decisions that result from the deliberations of the legislature.[66]

Notwithstanding the contributions that simple representation makes to mitigating the *nemo iudex* problem, Publius finds it insufficient. The first hints of this are presented in Number 10, just after praising the possible advantages of representation over

selected." ARISTOTLE, POLITICS, IV.1294b7-9, at 131 (Carnes Lord tr. 1984). Aristotle's suggestion is that mainly the rich will be able to win elections, and thus elections serve to install rule by the wealthy—which he terms oligarchy. Democracy, in contrast, is based on "those who are equal in any respect supposing they are equal simply" and insisting therefore that they "share in all things equally on the grounds that they are equal." *Id.* at IV.1301a29, IV.1301a37, 147. Herodotus makes a similar remark: "Rule by the majority (*plêthos de archon*), on the other hand, bears that fairest of all titles: 'Equality before the law.' … Those in office have their authority courtesy of a lottery, and wield it in a way that is strictly accountable. Every policy decision must be referred to the commonality of the people." HERODOTUS, THE HISTORIES, III.80, at 228 (Tom Holland tr., 2014).

65. Fed. No. 31, p. 195. Though it is not necessary to digress on Publius' account of responsibility here, suffice it to say that Publius is likely the first modern theorist to contemplate republicanism and representation in terms of such terminology. For the best discourse on responsibility in *The Federalist*, *see* Michael P. Zuckert, *The Virtuous Polity, the Accountable Polity: Liberty and Responsibility in* The Federalist, 22 PUBLIUS 123 (1992).

66. For a discussion of deliberation in *The Federalist*, *see* Larry Arnhart, *The Deliberative Rhetoric of* The Federalist, 19 POL. SCI. REVIEWER 49 (1990).

democracy (and thus over sortition as well). Representation is thought to provide distance from passion, yet, "[o]n the other hand, the effect may be inverted. Men of factious tempers, of local prejudices, or of sinister designs, may by intrigue, by corruption or by other means, first obtain the suffrages, and then betray the interests of the people."[67] In addition to the two types of interests competing in a democracy or a popular government operating by sortition (the public interest and the private interests of the citizens), we now have a third interest: the interest of the representative. In a democracy, the difficulty was helping reason to triumph over private interest and passion so that the public interest could prevail. With representation, it is imperative that the public interest prevail over not just the private interests of factions of citizens, but the interests of the various representatives themselves, which of course may have been modified by their elevation from ordinary citizen to representative. (At the very least, election to the legislature introduces the additional interest that they retain their office.) Publius' claim in Number 10 remains that election and the attendant "scheme" of representation may allow more wise and moderate men to be elected—and these men would have little trouble disposing of their constituents' factionalism as well as their own private interests. Even so, Publius acknowledges, ambitious citizens will engage in strategic behavior to obtain office, and there is no guarantee that, once they obtain it, their own personal private interests—a new strain of the virus of faction—could prevail.

So much for Publius' theoretical critique of representation. But, as usual, his most poignant arguments come in the form of historical examples, for they provide "beacons,

67. Fed. No. 10, p. 62.

which give warning of the course to be shunned."[68] Publius' beacon in this case is the House of Commons. Like the Congress established by the Constitution, Publius views the Commons as a fundamentally representative institution—indeed, it is the British regime's only "republican branch."[69] It is later clarified that the Commons is less representative than the House of Representatives will be:

> The number of inhabitants in the two kingdoms of England and Scotland, cannot be stated at less than eight millions. The representatives of these eight millions in the House of Commons, amount to five hundred fifty-eight. Of this number one ninth are elected by three hundred and sixty four persons, and one half by five thousand seven hundred and twenty three persons. It cannot be supposed that the half thus elected, and who do not even reside among the people at large, can add any thing either to the security of the people against the government; or to the knowledge of their circumstances and interests, in the legislative councils. … They might therefore with great propriety be considered as something more than a mere deduction from the real representatives of the nation.[70]

Although all members of the Commons are representative in *some* sense, the presence of rotten boroughs corrupts the institution, so that members of Parliament from such districts are not in truth representatives of the people.[71] The immediate context of this

68. Fed. No. 37, p. 233.

69. Fed. No. 39, p. 251.

70. Fed. No. 56, p. 382.

71. Publius' comment here may admit of some uncertainty. He does not tell us who exactly the 364 persons are who selected one-ninth of the Commons, and he does not specify who the 5,723 persons are who elect one-half of the Commons. But he does insert a footnote to "Burgh's polit. disquis." This is a reference to a 1774 edition of James Burgh's *Political Disquisitions*. In Volume I of that work, Burgh provides a detailed analysis of the makeup of the House of Commons, and includes figures that match Publius' figures in Number 56. *See* 1 JAMES BURGH, POLITICAL DISQUISITIONS: OR, AN ENQUIRY INTO PUBLIC ERRORS, DEFECTS AND ABUSES, 45 (1774), available at https://quod.lib.umich.edu/e/evans/N10941.0001.001/1:7.2?rgn=div2;view=fulltext. A few pages later, Burgh denies that the British constitution is a monarchy, aristocracy, democracy, or a mixture of them. In fact, he says, the British regime is a

passage is whether the House of Representatives will be too small for the number of citizens that elect them; Publius' goal is to compare the representative-to-constituent ratio in Great Britain and in America, in the hopes of making Americans more friendly to the sixty-five member House that the Constitution establishes. Thus Publius deems the representatives of the "rotten boroughs" representatives of *other* interests, not the people's interests. But, generally speaking, these observations only indicate that the Commons is imperfectly representative, not that it is *un*-representative. In his explanation of representation as a "substitute" for a meeting of the people, Publius singles out the House of Commons as one of the "few examples which are best known, and which bear the greatest analogy to our particular case"—that is, the Commons illustrates representation as a political concept sufficiently well that Americans can learn from it.[72] Indeed, the Commons is the first example that Publius raises—the other two are the Irish parliament and the states while under British rule—and he examines it at the greatest length. Notwithstanding the rotten boroughs, the core tenet of the House of Commons remains "binding the representatives to their constituents."[73] Significantly, Publius refers to members of Parliament here only as "representatives," never as "delegates."

Members of the Commons may be genuine representatives, and thus "there is always a large proportion of the body, which consists of independent and public spirited men"; that is, there are always men that put the public interest before either their private

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"ptochocracy"—a "government of beggars." "For a few beggarly boroughs," he says, "do avidly elect the most important part of the government, the part which commands the purse." On the same page, Burgh calls these boroughs "rotten." *Id.* at 50.

72. Fed. No. 52, p. 355.

73. Fed. No. 52, p. 356.

interests or the private interests of factions within their districts.[74] Yet Publius also calls attention to the "venality of the British House of Commons," which has "long [been] a topic of accusation against that body."[75] The venality of the Commons is juxtaposed here to the "venality in human nature";[76] as we saw in Chapter 1, Publius' view of human nature is neither entirely pessimistic nor entirely optimistic, so it may be said that Publius embraces a parallel view of the Commons. The Commons partly carries out the promise of representation by installing a considerable number of patriotic members; at the same time, it installs members that routinely act in their own private interests.

The chief example of this self-dealing, which for Publius is sufficient to condemn the House of Commons as not sufficiently avoiding the *nemo iudex* problem, regards parliamentary sovereignty, the gravity of which sits in the House of Commons. The Commons' totalizing power is most visible in its members' ability to augment their own term of office. In Great Britain, the "authority of the parliament is transcendent and uncontrollable."[77] Parliament, including the Commons as representative body, has

74. Fed. No. 76, p. 514.

75. Fed. No. 76, p. 514.

76. Fed. No. 76, p. 513.

77. Fed. No. 53, p. 361. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *90 (J.B. Lippincott Co. 1893), https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/2140/1387-01_Bk_Sm.pdf ("Because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledges no superior upon earth, which the prior legislature must have been, if its ordinances could bind a subsequent parliament."). Subsequent citations to Blackstone's *Commentaries* will take the form of "BLACKSTONE, COMMENTARIES" and the star number. The second volume may be found at 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (J.B. Lippincott Co. 1893), https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/2142/1387-02_Bk_Sm.pdf. For an analysis of Blackstone's theory of parliamentary sovereignty, *see* Howard L. Lubert, *Sovereignty and Liberty in William Blackstone's* Commentaries on the Laws of England, 72 R. POL. 271, 281 ("Blackstone rejects the natural law as a legal constraint on the

"actually changed, by legislative acts, some of the most fundamental articles of the government," including the "periods of election."[78] Most notably, they have not only "introduced" seven-year terms for members of parliament (in the place of three-year terms), but they have "by the same act continued themselves in place four years beyond the term for which they were elected by the people."[79] The act of unilaterally lengthening their terms of office without the consent of the people betrays the self-interested character of the members' decision. Extending the present term postpones the need for re-election and thus the salutary effects on representatives' behavior produced by an upcoming election. Publius calls this a "dangerous practice[]," for it threatens free government per se: a representative who can extend his term can perhaps do so indefinitely. In turn, the representative slips the restraints placed upon him by the people, liberates himself from any "dependence" on them, and thus jeopardizes his status as a true representative. The representative becomes at best a delegate, at worst an oligarch.[80]

Parliamentary sovereignty illustrates the basic problem of simple representation: Without countervailing constraints on the representatives (whatever these constraints

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legislative power for fear that appeals to it will inevitably foment political instability.").

78. Fed. No. 53, p. 361.

79. Fed. No, 53, p. 361.

80. In his *Dissertation Upon Parties*, Bolingbroke condemned the Septennial Act of 1716, which repealed the Triennial Act of 1694, thereby extending the maximum length of a Parliament to seven years. "The people of Britain," he wrote, "have as good a right, and a right as necessary to be asserted, to keep their representatives true to the trust reposed in them." HENRY ST. JOHN, 1ST VISCOUNT BOLINGBROKE, DISSERTATION UPON PARITIES, IN BOLINGBROKE: POLITICAL WRITINGS , 105 (David Armitage ed. 1997). Bolingbroke suggests that extending the term from three years to seven years suggests no limits whatsoever: "Propose the keeping up septennial, nay, the making decennial Parliaments. … since there can be no reason alleged for the first, which is not stronger for the last, and would not be still stronger for a longer term." *Id.*

may be), representatives will be constrained only by their own reason, a faculty that Publius concedes is often weak in comparison to passion and interest. To suppose that representatives in a system of parliamentary sovereignty will constrain themselves is to assume that they will be virtuous—a premise that Publius repeatedly rejects as a foundation for his political theory. On the contrary, Publius concludes that some institutions that serve the cause of freedom—such as the separation of powers—would not work if public officers entirely divorced their public duties from their private interests [81] While simple representation might mark an important step away from the *nemo iudex* problem by making it more probable that virtuous citizens will take the helm, for Publius this step is not a sufficient one—popular government remains disquietingly vulnerable to self-interest.

THE MIXED REGIME

Simple representation failed because vesting final political power in representatives, with no external check, presents too great a temptation for the representatives. Representatives are, on balance, more likely to exhibit self-control than the average citizen, self-control is not ensured. In this section, we take up the classical conception of the mixed regime as articulated by Aristotle and Polybius, but find that the mixed regime is not a tenable solution for Publius, on the grounds that it is inconsistent with strict republicanism. In the course of this investigation, we will also take up some scholarship that has read the Constitution (as well as *The Federalist*) as instituting the

81. Fed. No. 51., p. 349 ("The interests of the man must be connected with the constitutional rights of the place.").

mixed regime. Finally, we will turn to a modern, republicanized version of the mixed regime—called "actual representation"—which Publius rejects on similar grounds.

In Book IV of his *Politics*, Aristotle provides a typology of regimes. Each city, he explains, is made up of a "number of parts,"[82] such as well-off households, the poor, the armed, and the unarmed. All in all, this yields three basic forms of government—rule by one, rule by the few, and rule by the many—even though there are as many regimes as there are "arrangements based on the sorts of preeminence and the differences of the parts [of the city]."[83] Each of these three types of regimes come in correct and deficient varieties. Among rule by one, there is kingship (correct) and tyranny (deficient); among rule by the few, there is aristocracy (correct) and oligarchy (deficient); among rule by the many, there is "polity" (correct) and democracy (deficient). Correct regimes are correct because the rulers rule "with a view to the common gain"—that is, say in service of the public good—whereas deficient regimes are characterized by ruling in the interests of the rulers.[84] But sensing that correct regimes are susceptible to sliding into deficient regimes, Aristotle points out that regimes can be mixed to produce not only stability but good outcomes: "Simply speaking, polity is a mixture of oligarchy and democracy,"[85] and a polity may be produced by combining features of both oligarchy and democracy, such as setting an intermediate wealth standard for voting, rather than a very low one

82. ARISTOTLE, POLITICS, IV.1289b27, at 121 (Carnes Lord tr., 1984)

83. *Id.* at IV.3.1290a12, at 121.

84. *Id.* at III.7.1279b5-10, at 96. One could describe deficient regimes as deficient precisely because accommodate rather than repress the *nemo iudex* problem.

85. *Id.* at IV.8.1293b34.

(democracy) or a very high one (oligarchy).[86] In giving power to both the interests of the few wealthy citizens as well as the many poorer citizens, Aristotle hypothesizes that personal interests will recede into the background.[87]

It was Polybius, however, who articulated the decisive classical account of the mixed regime. Polybius drew on Aristotle for the basic framework—we must "distinguish three kinds of constitutions … kingship, aristocracy, and democracy."[88] But Polybius differed from Aristotle in stating which of the three (or which combination of the three basic types) was best: "For it is evident that we must regard as the best constitution a combination of all these three varieties, since we have had proof of this not only theoretically but by actual experience."[89] "Simple" regimes—that is, unmixed regimes—are "precarious, as [they are] soon perverted into the corrupt form," that is, the deviant forms of rule.[90] But when each form is mixed with the other two, "the force of each [is] neutralized by that of the others," and "neither of them should prevail and outbalance another, but that the constitution should remain for long in a state of equilibrium."[91]

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86. *Id.* at IV.9.1294a30-1294b10.

87. For an examination of "polity" in Aristotle's thought, especially its relation to "mixing" and "middling," see Curtis Johnson, *Aristotle's Polity: Mixed or Middle Constitution?*, 9 HIST. POL. THOUGHT 189 (1988).

88. POLYBIUS, HISTORIES, IV.2, in 3 THE HISTORIES OF POLYBIUS (Loeb Classical Library, 1922), at 273.

89. *Id.*

90. *Id.*, at 290-91.

91. *Id.* at 292. Here, Polybius states that Lycurgus—the mythical lawgiver of Sparta—was the first to devise the mixed regime. Nevertheless, in Polybius's own day, it is the Romans that have "arrived at the same faint result as regards their form of government" and set the standard for the mixed regime. *Id.* at 293.

Polybius' formulation of the mixed regime proved to be extremely durable, influencing such thinkers as Machiavelli[92] and many of the American Founders.[93] Paul Eidelberg, however, has gone furthest in attempting to close the gap between the Constitution of 1787 and the mixed regime.[94] Eidelberg opens *The Philosophy of the American Constitution* with a simple Polybian thesis: "the *Republic* established by the Founding Fathers was understood by them to be a *Mixed Regime*."[95] To make a long analysis rather short, the crucial move in Eidelberg's analysis is to turn Diamond's genus-species analysis on its head:

> Hamilton in Federalist 6 … says "Sparta, Athens, Rome, and Carthage were all republics." Notice that Athens, a democracy, is here regarded as a republic. But notice too that Sparta, Rome, and Carthage are also regarded as republics although they were mixed regimes having hereditary institutions! From this it appears … that republic is the genus, and that democracy is but one species of that genus.[96]

For Diamond, popular government was the genus, and republics and democracies were each species. For Eidelberg, republic is the genus, and democracies and mixed republics are the species. (Popular government remains undefined in Eidelberg's picture, although

92. *See, e.g.*, John P. McCormick, *Addressing the Political Exception: Machiavelli's "Accidents" and the Mixed Regime*, 87 AM. POL. SCI. R. 888, 891 (1993) ("Machiavelli has taken this traditionally Aristotelian word and given it here a use derived from Polybius' analysis of the mixed regime").

93. *See, e.g.*, Gilbert Chinard, *Polybius and the American Constitution*, 1 J. HIST. IDEAS 38, 42 (1940) (noting Polybius' influence on John Adams by way of Jonathan Swift).

94. Many thanks to Nathan Tarcov for pointing me in the direction of Eidelberg's work.

95. PAUL EIDELBERG, THE PHILOSOPHY OF THE AMERICAN CONSTITUTION: A REINTERPRETATION OF THE INTENTIONS OF THE FOUNDING FATHERS, 3 (1968) (emphasis in original).

96. *Id.* at 22 (emphasis in original).

he does acknowledge that deficiency.)[97] Thus, according to Eidelberg, when Publius criticizes democracy he is urging Americans to adopt institutions that mitigate the defects of democracy and that "these mitigations cannot be democratic."[98] Consequently, retaining democratic institutions like the House of Representatives, but mitigating the tendencies of democracy with other institutions, like the presidency or Senate, will not compromise on the regime's character as republic, but move it in the direction of the mixed regime. And the mixed regime question, in turn, is one not of absolute categorization, but of relative categorization. "Relative to the hereditary House of Lords, the original Senate appears democratic," Eidelberg says, yet "relative to the Council of Athens … the original Senate appears oligarchic, if not radically oligarchic."[99]

As attractive as Eidelberg's thesis may be for those who see a fundamental harmony between the American project and ancient political philosophy, it ultimately fails as an interpretation of *The Federalist*. Though Publius uses terms like republic in multiple ways, he rarely uses them relatively. That is, though Publius does call Sparta and Carthage republics, he means that they are republics *in a sense*, and that sense is the wrong sense, because it conceives of republicanism only in contradistinction to monarchy. Moreover, for Publius, in the final analysis, it should not be said that Sparta and Carthage are merely "less republican" when compared to, for example, the American state constitutions. In point of fact, the regimes of Sparta and Carthage contain some

97. *Id.* at 21 ("[W]e should have to determine what they meant by popular government… . [and] even if the Founders regarded popular government and democracy as synonymous, this would not be conclusive of their *real intentions*") (emphasis in original).

98. *Id. at 22.*

99. *Id*.

popular elements, but in the final analysis they are not republics. Publius' absolutism here is apparent in his analysis of regimes that are called republics. In Holland, "no particle of the supreme authority is derived from the people," thus it is not a republic; Venice is controlled entirely by "a small body of hereditary nobles," thus it is not a republic; Poland is a "mixture of aristocracy and monarchy,"[100] thus it is not a republic. Most significantly, the absolute analysis can be extended to the modern mixed regime par excellence, Britain: "The government of England, which has one republican branch only, [is] combined with a hereditary aristocracy and monarchy."[101] In Number 37, Publius does not include regime types alongside the "institutions of man" that evade "human sagacity" and yield only "obscurity."[102] Relative to the separation of powers or the various domains of law, which are more or less inscrutable, the categories of regimes are more susceptible to precise definition and analysis. The most that can be said for Eidelberg's effort to bring the Constitution under the heading of the mixed regime is that some of the Constitution's institutions are designed to produce the virtues of non-republican regimes. The Senate, for example, is indeed "designed to provide an aristocratic principle"—wisdom. Yet Publius defends the Senate as consistent with republican principles.[103] The Constitution of 1787 may have sought to produce the benefits provided by the mixed regime by emulating some of its characteristics, but that effort does not imply that the Constitution is or was intended to be a mixed regime.

100. Fed. No. 39, p. 250-251.
101. Fed. No. 39, p. 251.
102. Fed. No. 37, p. 235.
103. Peterson, *supra* Chapter 1, note 9, at 65.

If Publius (or the Founders more generally) agreed that the mixed regime solves the *nemo iudex* problem, why didn't they embrace it? For Publius, at least, the answer is clear: the mixed regime requires incorporating institutions that are not popular, and this would compromise on the requirement that the American regime be strictly republican. The mixed regime operates in part by balancing popular interests and passions against the interests and passions of a different "part" of society, in Aristotle's words. The only way to achieve this would be to establish aristocratic and perhaps monarchical institutions within the regime—institutions that would not derive their power from the "great body" of the people or serve only a limited duration.

Although the classical mixed regime is rejected on the basis that it is not compatible with strictly republican rule, Publius considers a related concept, which he terms "actual representation." Actual representation requires that "each different occupation should send one or more members" to the legislature for participation in lawmaking.[104] Doling out pre-determined legislative seats to different classes of citizens is thought "to combine the interests and feelings of every part of the community, and to produce a due sympathy between the representative body and its constituents."[105] Like the mixed regime, reserving legislative seats for specific interests within society aims at making each part's "feelings and interests … better understood and attended to"—that is, no part's interests or feelings (passions?) will be prejudiced because they were not involved in policymaking. To be sure, actual representation is not as similar to the mixed

104. Fed. No. 35, p. 219. For a discussion of the theory of actual representation in Number 35, *see* William B. Allen, *Federal Representation: The Design of the Thirty-Fifth* Federalist Paper, 6 PUBLIUS 61 (1976).

105. Fed. No. 35, p. 218.

regime as is, for example, Calhoun's concept the concurrent majority. For Calhoun, "the consent of each interest" was required "either to put or to keep the government in action."[106] Actual representation gives each part of society (however defined) a vote; the mixed regime and the concurrent majority give each part of society not only a vote, but a veto. From this point of view, actual representation is presented as a kind of compromise position between republicanism and the mixed regime: Officers derive their powers from the people via elections, yet it purports to yield benefits similar to those of the mixed regime.

Unsurprisingly, Publius roundly rejects actual representation, presenting two arguments against it. First, actual representation can be rejected on the basis that it is unnecessary. Publius weaves a detailed account of the interests of each occupation and how they align. "Mechanics and manufacturers," for example, "will always be inclined with few exceptions to give their votes to merchants in preference to persons of their own professions or trades."[107] The reason for this is that all three of these groups are "immediately connected with the operations of commerce," and merchants are economically downstream in the supply chain of mechanics and manufacturers. The interests of mechanics, manufacturers, and merchants thus all point in the same direction. (Publius does not explain, though, why merchants would not instead choose to vote for

106. JOHN C. CALHOUN, A DISQUISITION ON GOVERNMENT, IN UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN (Ross M. Lence ed., 1992), available at https://oll.libertyfund.org/title/calhoun-union-and-liberty-the-political-philosophy-of-john-c-calhoun#lf0007_head_003. For a thoughtful analysis of Calhoun, *see* Ralph Lerner, *Calhoun's New Science of Politics* 57 AM. POL. SCI. R. 918, 925 (1963) ("The principle of concurrent majority rule rests on this unavoidable diversity of interests, from which even our hypothetical homogeneous community is not immune. There are *always* at least two portions or interests in the community: the ins and the outs").

107. Fed. No. 35, p. 219.

mechanics and manufacturers. In other words, the question of why votes will be shifted down the supply chain rather than up it is left open.) Merchants, consequently, are the "natural representatives of all these classes of the community." Publius also considers the "learned professions," who "truly form no distinct interest in society" and so will be the "objects of the confidence of each other and of other parts of the community." The final class of society is the "landed interest," but these property owners' interests are "perfectly united from the wealthiest landlord to the poorest tenant," at least with respect to taxes.[108] In fine, Publius makes the dubious claim that the different interests distributed throughout American civil society will in effect be represented in the legislature, making actual representation superfluous.[109]

Second, and more compelling, Publius urges that actual representation would be unwise. Actual representation is unattainable without its being "expressly provided in the Constitution that each different occupation should send one or more members."[110] Short of this, "the thing would never take place in practice,"[111] because the voters may not ultimately elect a representative from a specific class, such as merchants. The scheme of actual representation therefore requires reserving concrete numbers of seats for each group within the legislature. Shortly thereafter, Publius points out the risk of reserving

108. Fed. No. 35, p. 220.

109. I state that this argument is dubious because, even within a single electoral district, manufacturers may have different or even competing interests. According to Publius, their common representatives—merchants—will be forced to choose sides between those interests, meaning there is in fact no class interests being represented in the legislature.

110. Fed. No. 35, p. 219.

111. Fed. No. 35, p. 219.

seats in the legislature: It does not "leave[] the votes of the people free."[112] Actual representation ultimately constrains the choice of the people so much that it can no longer be considered to be their own. Compelling merchants to vote for a merchants' representative (or compelling Presbyterians to vote for a Presbyterian representatives, to change the categories) ignores Publius' most fundamental observation about faction in Number 10: "The latent causes of faction … [are] every where brought into different degrees of activity, according to the different circumstances of civil society."[113] Numbers 10 and 35 echo each other in their incorporation of landed interests, manufacturing interests, and mercantile interests—but Publius specifies in Number 10 that "many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views."[114] Actual representation is a blunt instrument, dividing civil society in advance into distinct interests, without understanding that interests, opinions, and passions shift. In an important respect, actual representation is an attempt to stifle the liberty which "is to faction, what air is to fire."[115] The attempt to republicanize the mixed regime thus fails for the same reason that the mixed regime fails according to Publius: it is at root incompatible with republican government.

112. Fed. No. 35, p. 220.
113. Fed. No. 10, p. 58.
114. Fed. No. 10, p. 59.
115. Fed. No. 10, p. 58.

THE SEPARATION OF POWERS

The mixed regime's proposed solution to the *nemo iudex* problem is fundamentally one of division—judging in one's own cause becomes difficult when one cannot judge unilaterally. But the mixed regime faltered insofar as it required yielding some power to non-republican hands. The separation of powers, in this light, might be viewed as an attempt to take advantage of the benefits of the mixed regime without compromising on the need for republicanism. As with the mixed regime, the doctrine of separated powers divides power among distinct groups, but does so on the basis of government function, rather than on the basis of pre-existing fault lines within the political community, such as between the rich and poor. This section begins by outlining the traditional view of the separation of powers—a view that Publius attributes to the Anti-Federalists—and how it purports to solve the *nemo iudex* problem. The section then moves on to Publius' critique of the Anti-Federalist view: The separation of powers does not require *absolute* separation among the branches. Rather, the branches must quarrel with one another so that none ultimately gets the upper hand. And quarreling in turn requires the branches to share in some powers and for officers to associate their personal interests with the interests of their branch—otherwise there won't be cause to initiate (or defend against) a fight. Thus Publius' view of separated powers turns the *nemo iudex* problem on its head: For Publius, judging in one's own cause remains a vice when speaking of undifferentiated government power, but becomes a virtue when speaking of a branch's power.

Publius glosses the Anti-Federalist position on the separation of powers most directly in Number 47. Among the Anti-Federalists' "principal objections" to ratification is that it contains "supposed violations of the political maxim, that the legislative, the

executive and the judiciary departments ought to be separate and distinct."[116] Although Publius often regards Anti-Federalist attacks on the Constitution as illogical or dishonest, he goes out of his way to note that this Anti-Federalist objection is urged by "the more respectable adversaries to the constitution,"[117] thus requiring a more sophisticated rebuttal. The Anti-Federalists view the separation of powers in instrumental terms. It is one of (although not the only) "essential precaution[s] in favor of liberty."[118] Liberty however does not require a complete absence of restraint: the separation of powers serves the ends of liberty because it protects liberty from unjust, unwarranted intrusions. The Anti-Federalists and Publius are in agreement that the combination of all legislative, executive, and judicial powers in the same hands may "justly be pronounced the very definition of tyranny."[119] (A fair inference form this statement may be that Publius is deliberately invoking the classical conception of tyranny, according to which the tyrant rules without legal limitation and according to his own interest, not according to the public good.)[120] If tyrannical rule consists in rulers deciding on the basis of private motives, then the problem of tyranny is related to the *nemo iudex* problem. The tyrant

116. Fed. No. 47, p. 323.

117. Fed. No. 47, p. 323.

118. Fed. No. 47, p. 323.

119. Fed. No. 47, p. 324

120. According to Plato, a tyrant's soul is "filled with much slavery and illiberality," and to satisfy his passions he renders the most "decent" parts of the city slaves to the most "depraved and maddest" parts. PLATO, THE REPUBLIC, 577d (Allan Bloom tr. 1968). For a discussion of the relationship between Publius' concern about tyranny and the separation of powers, *see* George W. Carey, *Separation of Powers and the Madisonian Model: A Reply to the Critics*, 72 AM. POL. SCI. R. 151 (1978).

confuses private life with public life, and thus confuses the public good with his private good.

The separation of powers, according to the Anti-Federalists as well as Publius, seeks to prevent such tyrannical rule by dispersing decision-making power, not unlike the mixed regime. If decision-making power is decentralized among many parties and concurrence is required among them, then arbitrary rule would require a complete alignment of interest, passion, or opinion contrary to the public good. For the Anti-Federalists, separated powers' indispensability for liberty entails that powers must be absolutely separate and distinct. Each of the three departments of government must be sufficiently powerful to remain in its initial place; if not, "all symmetry and beauty of form" will be "destroy[ed]," thereby jeopardizing political liberty.[121] Government is not a machine in motion, but a cathedral in stasis. Should one department be even slightly more powerful than another, the "edifice" will be in "danger of being crushed by the disproportionate weight of other parts."[122] The Anti-Federalists' geometrical, ultra-formalistic analysis of the doctrine of separated powers leads to dogmatic absolutism.

Indeed, the Anti-Federalist objection is rooted in a "political truth" of great "intrinsic value."[123] The separation of powers *does* serve to deter rulers from ruling simply in accord with private motive. But the Anti-Federalist have "misconceived and misapplied" that truth by requiring an absolute separation between the departments of government.[124]

121. Fed. No. 47, p. 324.
122. Fed. No. 47, p. 324.
123. Fed. No. 47, p. 324.
124. Fed. No. 47, p. 324.

In their zeal for simplicity, the Anti-Federalists have ignored the problem of enforcement. (This dissertation more comprehensively takes up the question of enforcing constitutionalism in Chapter 5.) If the separation of powers is essential to establishing and preserving liberty, then preventing illicit combinations of powers becomes essential to liberty as well. Publius considers the question of enforcement to be the central issue of separation of powers theory, devoting three papers to it. Publius notes in the first place that it would be naïve to expect that describing each branch's powers "with precision" will suffice.[125] Even if it were possible to so describe the "three great provinces" of government power,[126] "power is of an encroaching nature," and officers will transgress.[127] If each branch is not "effectually restrained from passing the limits assigned to it," then the limits will be meaningless and the separation of powers useless in the safeguarding of public liberty.[128] In a representative republic, "legislative usurpations" are especially likely. One reason for this that seems to bother Publius is that legislative powers, in comparison to executive and judicial powers, are "at once more extensive and less susceptible of precise limits." He remarks that "It is not infrequently a question of real-nicety in legislative bodies, whether the operation of a particular measure, will, or will not extend beyond the legislative sphere"—meaning that legislatures are predisposed to

125. Fed. No. 48, p. 332.

126. *See* Fed No. 37, p. 235 (noting that the lines between the legislative, executive, and judicial powers are obscure and will inevitably elude the human intellect). For a recent treatment of Number 37's central importance to the entire project of *The Federalist*, *see* Todd Estes, *The Emergence and Fundamental Centrality of James Madison's* Federalist *37: Historians, Political Theorists, and the Recentering of Meaning in* The Federalist, 12 AM. POL. THOUGHT 424 (2023).

127. Fed. No. 48, p. 332.

128. Fed. No. 48, p. 332. The remark here is reminiscent of Machiavelli's stated aim to describe the effectual truth of politics. *See* MACHIAVELLI, *supra* note ___, Chapter XV.

cross boundaries even in good faith. By implication, a legislature's vague and capacious powers may give it cover when it operates in bad faith.

The question for the Anti-Federalists, then, is on what mechanism can the separation of powers rely to ensure that the three types of government power remain "wholly unconnected"?[129] No single branch can be relied upon because that branch may be biased. So Publius turns to Thomas Jefferson's proposal to let the people adjudicate between the warring branches. Publius first attacks Jefferson's specific proposal, which places the people in the position of judge only when two branches concur that there is a controversy that warrants such an appeal. Publius' response is that this solution would simply shift the locus of the *nemo iudex* problem.

> [T]he provision does not reach the case of a combination of two of the departments against a third. If the legislative authority, which possesses so many means of operating on the motives of the other departments [such as regulating emoluments], should be able to gain to its interest either of the others … the remaining department could derive no advantage from this remedial provision.[130]

Anti-Federalists who rely on precisely marking the boundaries of the three branches fail to understand that the legislature especially could not be trusted to decide the extent of

129. Fed. No. 48, p. 332.

130. Fed No 49, p. 339-340. William Allen (writing with Kevin Cloonan) notes here that the criticism of Jefferson's proposal resolves down to one about parties: "[T]he chief question is whether all political disputes don't boil down ultimately to parties. If so, will we not in fact bring these parties into our periodic constitutional conventions meant to resolve the difficulties between the contending parties? Won't this produce a decisively artisan result rather than a result that will in fact enhance the constitution as comprehensive, organic, organizing principle for the society? So Publius takes up Thomas Jefferson's draft … with the understanding that the whole point of a founding is decisively to establish the rule of a single, fundamental party." W. B. ALLEN & KEVIN CLOONAN, THE FEDERALIST PAPERS: A COMMENTARY 234 (2004).

its own powers. For his part, Jefferson does not understand that his proposal will allow the legislature to judge in its own cause by manipulating the interests of another branch—thus giving it room to acquire power at the expense of the third branch.

But the problem of enforcement does not go only to the specifics of Jefferson's proposal; it is "inherent" in the idea of appealing to the people to settle separation of powers disputes.[131] Publius paints in broad strokes when he notes that "every appeal to the people will carry an implication of some defect in the government," thereby undermining government authority and the "requisite stability" to keep the peace.[132] (No distinction is made between appeals to the people to resolve constitutional disputes and the amendment process set out in Article V of the Constitution, perhaps because this argument is rather weak. After all, both Article V and Jefferson's proposals rely on popularly elected conventions to make the final determination.) But a "still more serious objection" is that these appeals to the voters will end up "disturbing the public tranquility by interesting too strongly the public passions."[133] Per Number 10, the default state of political society is to be shattered into numerous factions, each of which is pursuing its own private interest or passion; throwing decisions regarding the separation of powers to such factions will ignite those interests or passions further—different factions will stand to gain or lose depending upon the outcome of the adjudication. The state constitutions evaded this problem during their establishment only because the nation

131. To be sure, Publius' argument here is not confined only to enforcing the separation of powers, but to all "constitutional questions." Fed. No. 49, p. 340. This raises the question to what extent the separation of powers is dependent on constitutionalism for its existence. This is an issue to which we return at the end of this section.

132. Fed. No. 49, p. 340.

133. Fed. No. 49, p. 340.

was "in the midst of a danger which repressed the passions most unfriendly to order and concord"—in other words, conditions were such that it was easy for the people to put the public good over their own good. Such conditions, however, are not to be relied upon in "future situations."[134]

The "greatest objection" to appealing to the people however lies not in the private motives of various factions of citizens, but that the people *as a whole* will prejudice the executive and judiciary on account of private motives. The executive and judiciary are "too far removed from the people to share much in their prepossessions," and thus become for the people "objects of jealousy"—their activities will be routinely "discolored and rendered unpopular." Representatives and senators, in contrast, are "numerous" and "dwell among the people at large"—they have "connections of blood, of friendship and of acquaintance" with many voters, leading to outsized "personal influence." And, even more significantly, these connections with the people give federal legislators an advantage in "gain[ing] them a seat in the convention" tasked with deciding the separation of powers dispute. Publius highlights the deep *nemo iudex* issue here by stating that the legislators, when taking their seats at the convention, will have "constituted themselves as judges." "With these advantages," we are told, "it can hardly be supposed that [the executive or judiciary] would have an equal chance for a favorable issue." The thread connecting all of these arguments is that occasional appeals to the people invite them to decide based on passion, yet it is "the reason of the public alone" that commands authority.[135]

134. Fed. No. 49, p. 341.

135. Fed. No. 49, p. 343.

The practical conclusion of this line of reasoning is clear: the Anti-Federalist's enthusiasm for liberty has simultaneously led them to endorse an absolutist vision of the separation of powers as well as prevented them from thinking through any enforcement mechanism that will effectually keep the branches constrained. All methods of enforcement ultimately wish away the *nemo iudex* problem rather than face it head on.

Publius solves the Anti-Federalist problem by arguing that the true doctrine of separated powers mandates only a sufficient separation such that an "accumulation" of power does not occur. Thus he states that the "*accumulation* of all powers … may justly be pronounced the very definition of tyranny."[136] And he concedes that, were the Constitution "really chargeable with this *accumulation* of power or with a mixture of powers having a dangerous tendency to such an *accumulation*," then the Constitution would be indefensible—as indefensible as if it were not entirely republican.[137] Absolute separation between the branches is not required; the doctrine insists only upon as much separation as is necessary to prevent conclusively an accumulation of power. Publius turns away from the geometrical abstractions of the Anti-Federalists toward history and experience, which are less absolute. It is the British and (ironically for the Anti-Federalists) state governments that support the claim that blended powers can be compatible with liberty.

Publius' departure from the Anti-Federalist view of the separation of powers is related to a qualified embrace of judging in one's own cause. Publius is of course in agreement with the Anti-Federalists that undifferentiated government power should not

136. Fed. No. 47, p. 324 (emphasis added).

137. Fed. No. 47, p. 324 (emphasis added).

be wielded such that private motives produce outcomes that ought to accord with the public good. At the same time, Publius views the private motives of officers as essential to preserving the separation of powers. The "due foundation" of separated powers is that "each department should have a will of its own."[138] Without distinct wills, the different branches may align and the formal separation will have no functional effect. And separate wills require that each branch have "as little agency as possible in the appointment of the members of the others"; likewise, "the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices."[139]

But once independent wills are established, how can they be preserved? Publius argues that preventing the conglomeration of departments into a tyrannical government turns on two factors: officers in each branch must be given (1) "the necessary constitutional means" and (2) the "personal motives" to resist once another.[140] Motive and opportunity must coincide, producing a "defence" against the encroachments of ambitious co-branches. Here our attention must focus on the second prong—personal motives. The motives that Publius draws upon—especially ambition—have mixed reputations: they can be used nobly, but often are not. And these motives are entirely private in nature: "*The interest of the man* must be connected with the constitutional rights of the place," and "*the private interest of every individual*, may be a centinel over the public rights."[141] If officers do not identify their personal good with the good of the branch to

138. Fed. No. 51, p. 348.
139. Fed. No. 51, p. 348.
140. Fed. No. 51, p. 349.
141. Fed. No. 51, p. 349 (emphasis added).

which they belong, they may not act in the best interests of the branch, leaving it vulnerable to attack. If Publius' critique of popular rule is any guide,[142] the combination of public decision-making with the elevation of private interest here ought to raise serious *nemo iudex* concerns. Yet Publius' point appears to be this: the Anti-Federalists are correct that the separation of powers guards liberty by preventing government power as such from being wielded in such a way as to violate the *nemo iudex* principle, but preserving such a separation requires embracing *nemo iudex* to a limited extent. Judging in one's own cause must be shunned at the level of undifferentiated government power, but once government power has been differentiated and allocated throughout the government, the separation of powers affirmatively demands public decisions be made on the basis of private motives—otherwise inter-branch conflict will not occur. This conclusion is palatable also because the decisions being made by self-interested actors would appear to focus on the balance of powers between branches, not on the success of particular policies. Because keeping the respective branches in proper balance serves the public good, the *nemo iudex* idea becomes to some extent a tool, not a problem.

Throughout this discussion, it may have appeared that Publius views the separation of powers as being contingent upon constitutionalism—that is, upon some kind of higher law. Such an impression can fairly be made on the basis of turns of phrase such as "parchment barriers,"[143] exhortations to keep the branches "within their constitutional limits,"[144] as well as several invocations of how state constitutions set up

142. *See supra* Chapter 2, at 98.

143. Fed. No. 48, p. 333.

144. Fed. No. 49, p. 339.

their own systems of separated powers.[145] But Publius acknowledges that the British regime—which is not a constitution in the proper sense, as we will come to see in Chapter 3—retains *some* form of separated powers and thus liberty.[146] For Publius and the Anti-Federalists, it remains possible that a system of separated powers could be established without a formal constitution, just as the mixed regime could be so established. Publius then may be gesturing toward the idea that only the true doctrine of separated powers—the one that does not rely on absolute separation or precise definitions of powers—is dependent upon constitutionalism. And it is that true doctrine of separated powers, relying upon and in combination with constitutionalism, that is able to adequately solve the *nemo iudex* problem.

A Confederacy of Republics

The chief point of contention between Federalists like Publius and Anti-Federalists regarded the relationship of the national government to the various state governments. Notwithstanding the clarity of the subject of their dispute, there has been considerable confusion about the precise position of each side, and especially what terminology to use to describe those positions. The Anti-Federalist camp has been described as exhibiting "extreme heterogeneity,"[147] but for our purposes it might be assumed that they were of one voice in preferring more power for the state governments over and against the national government. For Publius, much of this heterogeneity is beside the point. Publius

145. *See* Fed. No. 47, p. 327-331.

146. Fed. No. 47, p. 324-327.

147. Herbert J. Storing, What the Anti-Federalists Were For, 5 (1981).

urges voters to acknowledge that they face a stark choice: the Union cannot be preserved without a government "at least equally energetic with the one proposed" by the Constitution, thus they must choose between the Constitution and disunion.[148] This section takes up what Publius deems to be the Anti-Federalist position—that a confederation of small republics is the right course. It then identifies Publius' basis for rejecting the Anti-Federalist position as the *nemo iudex* problem; by leaving final political authority with the constituent political entities, all confederacies are vulnerable to self-interested decision making by those entities.

Before laying out Publius' understanding of the Anti-Federalist position and explaining how it purports to solve the *nemo iudex* problem, let us first briefly survey the geography of the dispute between Publius and the Anti-Federalists. Publius describes the system proposed by the Constitution as a "compound republic," which he calls a government in which "the power surrendered by the people, is first divided between two distinct governments."[149] Michael Zuckert has recently reminded readers that it is a mistake to read Publius as advocating a distinct "third form" of government.[150] Rather, the compound republic was viewed by the founding generation, Publius included, simply as a "combination of … two forms" of government.[151] These two forms are (1) the

148. Fed. No. 1, p. 3.

149. Fed. No. 51, p. 351.

150. Michael Zuckert, The Federalist*'s New Federalism*, in THE CAMBRIDGE COMPANION TO *THE FEDERALIST*, 166 (Jack N. Rakove & Colleen A. Sheehan eds., 2020) (interpreting Martin Diamond, *What the Framers Meant by Federalism*, in AS FAR AS REPUBLICAN PRINCIPLES WILL ADMIT: ESSAYS BY MARTIN DIAMOND (William A. Schambra ed. 1992)).

151. *Id.*

"confederal or federal" type of government and (2) the "unitary or national" form of government.[152]

The confederal type is one in which independent political communities unite for some common purpose, but the confederation's authority turns on the constituent communities' consent. A national government is one in which all political authority is lodged in the government, and if authority is shared with subsidiary institutions, it is only at the grace of the national government. The compound republic is not a distinct third way—it simply incorporates elements of both the confederal and the national forms. According to Zuckert, this explains Publius' remark in Number 39 that the government proposed by the Constitution is "in strictness neither a national nor a federal Constitution; but a composition of both."[153] The target of this section is confederal government, unmixed with national elements. Publius identifies this form of government with the Articles of Confederation and devotes a series of papers in *The Federalist* to refuting the notion that a confederacy can sustainably bind the states into a union.

On what basis can a confederacy assert a solution to the *nemo iudex* problem? Although Publius does not engage in that inquiry per se, the best answer lies in the Anti-Federalists' insistence (according to Publius) on a confederacy *of small republics* and the related view, inherited from Montesquieu, that virtue is essential to republican rule.[154]

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152. Martin Diamond, The Federalist's *View of Federalism*, in AS FAR AS REPUBLICAN PRINCIPLES WILL ADMIT: ESSAYS BY MARTIAN DIAMOND, 110 (William A. Schambra ed. 1992).

153. Fed. No. 39, p. 257.

154. Here it is briefly worth noting a battle waged among political theorists and historians as to whether the American Revolution and ratification of the Constitution marked a radical turn from classical republicanism, which set virtue as its north star, to liberalism, founded on individual rights and economic interests and rejecting virtue as essential to free society. The debate was set off largely by the publication of Louis

The "necessity of a contracted territory for a republican government" follows from the expectation that a large republic does not afford citizens the kind of mutual good feeling necessary to pursue the public good.[155] That is, according to the Anti-Federalists, republicanism places power in the hands of the people; for the people to pursue the public good, they must be willing to subordinate their private interests and passions, and they will only make such a sacrifice on a consistent basis if they know the people for whom they make the sacrifice. Otherwise, private interest will prevail over virtue and the public good, and over time the small republic will devolve.[156]

A confederacy of small and virtuous republics purports therefore to solve the *nemo iudex* problem in two steps. The first step regards the local level. Citizens in a small republic are capable of ruling virtuously, putting the public interest over their own, and may thereby conquer the *nemo iudex* problem within their local sphere. The second step

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Hartz' *The Liberal Tradition in America* in 1955. Hartz argued that America is liberal through and through. Opposed to Hartz are scholars like Gordon Wood, who argue that the "sacrifice of individual interests to the greater good of the whole formed the essence of republicanism and comprehended for Americans the idealistic goal of their Revolution." GORDON S. WOOD, CREATION OF THE AMERICAN REPUBLIC, 53 (1969). "The eighteenth-century mind was thoroughly convinced that a popularly based government cannot be supported without *Virtue*." *Id.* at 68. For a general discussion of the debate between the liberal and classical republican tradition, including where other scholars like Richard Hofstadter and J.G.A. Pocock fit into the picture, as well as a suggestion that the distinction between liberalism and classical republicanism may be somewhat artificial, *see* EPSTEIN, *supra* Introduction, note 18, at 3-5.

155. Fed. No. 9, p. 52.

156. Leonard Sorenson argues, rightly in my view, that virtue is not enough for Publius. Virtue orients the direction of man's ends but does not provide the energy for his undertaking those ends. What provides energy is ambition. *See* Leonard R. Sorenson, *Madison on Sympathy, Virtue, and Ambition in the* Federalist Papers, 27 POLITY 431 (1995). Sorenson's thesis thus provides a nice contact point between virtue and interest, which highlights the artificial opposition in the literature between republicanism and liberalism.

regards the confederate level. In a confederacy of virtuous republics, the officers in the confederate body will not fall prey to the temptations of private interest and passion, presumably because the safety and wellbeing of *their republic* turns on the continued vitality of the confederation itself. The argument may be summarized in the following way: In a confederation of virtuous republics, the interests of the confederation and the constituent republics align; the confederation's officers, who are citizens of a constituent republic and are capable of pursuing their republic's good at the expense of their own personal good, will pursue the confederation's interest *because* it is in their republic's interest.

Although Publius famously attacks step one of this analysis in Numbers 9 and 10, the series of essays running from Number 15 through 22 can be construed as an all-out assault on step two. In fact, Publius contends, the virtuous citizen's love of their own republic will bias them in the operations of the confederacy. What's more, the nature of confederacies is such that the confederacy as an institution has no recourse (aside from force or threats of force), leading to the inevitable dissolution of the confederation.

Publius' argument begins with a general observation about law. "The great and radical vice in the construction of the existing Confederation," Publius says, "is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES and as contradistinguished from the INDIVIDUALS of whom they consist."[157] The Articles of Confederation and confederacies in general are not governments properly speaking. "Government implies the power of making laws. It is essential to the idea of law that it be attended with a sanction; or, in other words, a penalty or punishment for

157. Fed. No. 15, p. 93.

disobedience."[158] Publius then specifies that punishment must take one of two forms, although each is built upon the concept of coercion. First are courts of justice ("the COERTION of the magistracy") and the second is military force ("the COERTION of arms").[159] These types of coercion may be distinguished in the following way: the coercion employed by courts and magistrates applies only to individuals (thereby suggesting criminal punishment), whereas coercion by force of arms can be deployed against individuals and groups.[160] But, because a confederacy's "laws" only apply to constituent states and not to individuals, a confederacy seeking to punish violations of its rules can only do so through military action, not through courts and magistrates. If a constituent state disobeys the laws of a confederation, the confederation's only recourse is war. Publius' critique is that confederations undermine their own *raison d'être*: confederations arise to "provide for the security of the united body,"[161] yet the only way to preserve the confederation is internal warfare. When the laws of the confederacy are violated, "the only constitutional remedy is force, and the immediate effect of the use of it, civil war."[162]

Though the confederacy may be made up of rules that bind the states morally, the effect is that the confederation's resolutions are "in practice … mere recommendations,

158. Fed. No. 15, p. 95.

159. Fed. No. 15, p. 95.

160. One wonders, however, whether criminal punishment in the form of incarceration or even the death penalty can be so cleanly distinguished from war. Resistance to the enforcement of criminal or even civil punishment ultimately stops at force, in the form of confinement. Publius may have been correct, though, for a different reason: even at war, it is ultimately individual persons who suffer the effects of force through their injuries or even their death. Force cannot literally be applied against organizations like states, although the moniker "corporation" would suggest otherwise.

161. Fed. No. 9, p. 54 (quoting Montesquieu).

162. Fed. No. 16, p. 99.

which the States observe or disregard at their option."[163] Publius then extrapolates this analysis to all forms of treaty-making (or contracting) among sovereign parties: Although there is nothing "absurd or impracticable" about the notion of alliances, "the obligations of good faith" alone cannot sustain an alliance.[164] The "instructive but afflicting lesson" that confederacies teach mankind is that generally opposing "considerations of peace and justice to the impulse of any immediate interest or passion" will lead interest and passion to prevail. Constituent states know that the confederacy cannot respond proportionately to violations of the confederacy's laws: the confederacy must either tolerate the violations or go to war to enforce the laws. "From this spirit," Publius says,

> [I]n every political association which is formed upon the principle of uniting in a common interest a number of lesser sovereignties, there will be found a kind of excentric tendencies in the subordinate or inferior orbs, by the operation of which there will be a perpetual effort in each to fly off from the common center.[165]

The constituent bodies will feel free not to comply with the laws of the confederacy and so to pursue their own interest. "The rulers of the respective members, whether they have a constitutional right to do it or not, will undertake to judge of the propriety of the measures themselves." Indeed, "[t]hey will consider the conformity of the thing proposed or required to their immediate interests or aims."[166] Publius' account of law here is one rooted in deterrence—for an enactment to constitute law, it must change prospective behavior, and law can do so only by credibly threatening to punish violators. The

163. Fed. No. 15, p. 93.
164. Fed. No. 15, p. 94.
165. Fed. No. 15, p. 96-97.
166. Fed. No. 15, p. 97.

problem of confederacies is that the only type of punishment available to them—civil war—is in truth a last resort. Constituent states are thus free to violate the laws of the confederacy, because the laws do not effectually compel the sacrifice of their particular interests to the good of the confederacy.

The general problem of confederacy manifests in the Articles of Confederation most egregiously regarding taxation and war-making. The Articles require unanimity among the states for any binding resolution, leading to self-interested decision making at the confederate level. But Publius observes that even when resolutions are promulgated, they are not executed, for "[e]ach State yielding to the persuasive voice of immediate interest and convenience has successively withdrawn its support."[167] Why pay the required tax to the confederate government when other states are not? Although a majority of constituent states could ally together to compel a violating state to pay a tax, they could do so only through civil war, and such action "would probably terminate in a dissolution of the Union."[168] Why not instead "pursue the milder course of putting themselves upon an equal footing with the delinquent members by an imitation of their example"? Having succumbed to the *nemo iudex* problem, the Articles are not even "capable of answering its end."[169]

Lest there be any doubt that Publius' critique of the Articles of Confederation is simultaneously a general attack on confederations as such, Publius carefully catalogues the devastating nature of the *nemo iudex* problem in both ancient and modern

167. Fed. No. 15, p. 98.
168. Fed. No. 16, p. 101.
169. Fed. No. 16, p. 99.

confederacies. The Amphictyonic council, for example, was staffed by representatives of the constituent city-states, not dissimilar from the Articles of Confederation. Yet, "[t]he more powerful members [of the council] instead of being kept in awe and subordination, tyrannized successively over all the rest."[170] The delegates from the more powerful states "awed and corrupted those of the weaker," turning the operations of the confederacy "in favor of the most powerful party."[171] The Achaean league, though "far more intimate" and having an internal organization "much wiser" than the Amphictyonic, succumbed to similar convulsions.[172] Publius cites the Abbé Mably for the proposition that the Achaean league was less "tempestuous" than other popular regimes, leading to no "disorders" within the member states.[173] Yet Publius cautions that we should not conclude "too hastily" that "faction" did not work its wiles on the subsidiary republics. The Achaeans' success, Publius suggests, appears to have been on account of the policies of Alexander the Great and his father, Philip, who spared the Achaean league from Macedonian oppression. But when the "successors of these princes" turned their eyes toward the Achaean league, "the arts of division" came to be practiced among the Achaeans.[174] "Each city," he says, "was seduced into a separate interest; the Union was dissolved. Some of the cities fell under the tyranny of Macedonian garrisons; others under that of usurpers springing out of their own confusions."[175] When constituent states are

170. Fed. No. 18, p. 111.
171. Fed. No. 18, p. 111.
172. Fed. No. 18, p. 113.
173. Fed. No. 18, p. 114.
174. Fed. No. 18, p. 115.
175. Fed. No. 18, p. 115.

unbound by the law of the confederacy, they consider their own interests, and those interests may even be manipulated by foreign powers who cunningly divide and conquer.

Turning to modern European confederacies, Publius' main examples are the German and Dutch confederacies. The "fundamental principle" upon which the German confederacy rests is "that the empire is a community of sovereigns; that the Diet is a representation of sovereigns; and that the laws are addressed to sovereigns."[176] But this leaves the central authority "incapable of regulating its own members" and—to continue the metaphor of disease—is "agitated with unceasing fermentations in its own bowels."[177] Although the Germans have evaded the foreign pressures that ultimately obliterated the Achaean League, Publius nevertheless characterizes German history as replete with military struggles between the central authorities and the chiefs of the constituent states as well as among the constituent states themselves.[178] Though the German confederacy

176. Fed. No. 19, p. 119.

177. Fed. No. 19, p. 119.

178. "The history of Germany is a history of wars between the Emperor and the Princes and States; of wars among the Princes and States themselves; of the licentiousness of the strong, and the oppression of the weak." Fed. No. 19, p. 119. Publius goes on to include the "foreign intrusions, and foreign intrigues" here, but he states later that such intrusions and intrigues have largely failed in picking off smaller German states from the confederacy. The reason for this, Publius says, is obvious: "The weakness of most of the members, who are unwilling to expose themselves to the mercy of foreign powers; the weakness of most of the principal members; compared with the formidable powers all around them; the vast weight and influence which the Emperor derives from his separate and hereditary dominions; and the interest he feels in preserving a system, with which his family pride is connected, and which constitutes him the first Prince in Europe." Fed. No. 19, p. 121. The smaller states know that their interests lie in protection by a larger, more powerful entity. Their refusal to abandon the German confederacy boils down to the notion that the German emperor is the strongman of Europe.

has not yet disintegrated, it is vulnerable to foreign attacks because any unified military action "must be preceded by so many tedious discussions, arising from the jealousies, pride, separate views, and clashing pretensions, of sovereign bodies."[179] On this basis, Publius recommends that the German confederacy not be emulated.

The Dutch confederacy fares no better. Though the "stadtholder"—a hereditary prince and chief executive of the confederacy—wields considerable power, the tenets of the confederacy are often ignored. The taxes owed by poorer states are often waived so that wealthier states have less justification for refusing to pay theirs. Even the unanimity required to make a treaty is ignored, as when the Netherlands agreed to the Peace of Westphalia as well as its recent treaty with Great Britain.[180] Yet this habit of "overleap[ing] their constitutional bounds" creates a spirit of "anarchy and dissolution"—Publius observes, for example, that though taxes might be waived at a moment of great need, the confederacy has several times rescinded the waiver "at the point of the bayonet."[181] The Dutch people's "adverse opinions and selfish passions" have brought "calamities," which Publius encourages Americans to thank God they have thus far avoided. Publius predicts that the Dutch, then suffering from internal convulsions and foreign pressures, will meet the "crisis of their destiny," but expresses faint hope for a brighter future.[182]

Near the end of this parade of horribles, Publius refuses to apologize for the length of his disquisition into the history of confederacies. "Experience," he says, is unequivocal here, and when history speaks so unequivocally—a rarity indeed—we must treat its

179. Fed. No. 19, p. 120.
180. Fed. No. 20, p. 127.
181. Fed. No. 20, p. 126-127.
182. Fed. No. 20, p. 128.

lessons as "conclusive and sacred."[183] The root of the problem is confederacy's disharmony with law; it "substitut[es] *violence* in place of *law*."[184] Consequently, the remedy Publius recommends for America is a central government rather than a confederate government, a government capable of enforcing laws over individuals.[185] But the feebleness of confederacies would not be much of a problem, Publius makes clear, were it not for the *nemo iudex* problem. The constituent states' confidence that they won't face punishment creates room for acting on their own private interests and passions—room that leads to the unhappiness of the people and, more likely than not, civil war.

183. Fed. No. 20, p. 128.

[184] Fed. No. 20, p. 129.

185. Fed. No. 15, p. 93-96. Publius' recommendation, however, is incomplete insofar as he does not explain how the Constitution, in applying to individuals, likewise can bind states. That is, he ignores that the problem of confederacy survives the ratification of the Constitution insofar as the states are not individuals; assuming the premises about the coercion of the magistracy in Number 15, the central method of enforcing the Constitution against the states remains warfare. Although one might think that the creation of the federal courts, an issue we take up most directly in Chapter 4, would solve the problem, Publius insists absolutely in Number 81 that the states will retain sovereign immunity in federal courts, a premise that the Supreme Court affirmed in *Hans v. Louisiana*, 134 U.S. 1 (1894). Yet the Court carved out a significant exception to sovereign immunity in *Ex parte Young*, 209 U.S. 123 (1908), one that Publius may have appreciated. In *Young*, the court held among other things that suing a state officer tasked with enforcing a state law alleged to be unconstitutional did not violate sovereign immunity. The crucial distinction, then, is not dissimilar from Publius' point in Number 15: the federal courts may not have power over the state in its corporate capacity in such a case, but it certainly has jurisdiction over an individual acting in their official capacity. *Young* points the way to completing Publius' thought: the central government's power (via courts or otherwise) over individuals can provide, in a way, power over the state government, precisely because the state government must be staffed by individuals.

THE EXTENDED REPUBLIC

It should be no surprise that a substantial portion of our investigation into the *nemo iudex* problem has implicated the most celebrated essay in *The Federalist*—Number 10.[186] As we saw, Number 10 is directed at providing a remedy to the vice of faction, which is vicious precisely because it consists in a group judging in its own cause. With this relationship in mind, it may be the case that the problem of faction is simply a restatement of the *nemo iudex* problem but placed in a republican context. From this position follows a question that is critical to our present investigation. Namely, because Number 10 not only diagnoses and analyzes the problem of faction but proposes a solution to it, should Publius not be understood in Number 10 as proposing a definitive solution to the *nemo iudex* problem in a republican context? In other words, what reason is there to think that Number 10's extended republic argument is not the innovative, republican complete solution to the *nemo iudex* problem? Although Number 10 is the subject of a vast secondary literature and there is no need here to add to it, it is necessary to explain the details of this line of reasoning. This section concludes that, on the contrary, Publius recognizes some rather strict limits to the solution described in Number 10, limits that confine the benefits of the extended republic to *ordinary* politics rather than founding or constitutional politics. It is the introduction of this distinction that then opens up the possibility that constitutionalism—the subject of Chapter 3—may provide the best solution to the *nemo iudex* problem.

186. Alan Gibson notes this in passing. *See* Alan Gibson, *Impartial Representation and the Extended Republic: Towards a Comprehensive and Balanced Reading of the Tenth* Federalist *Paper*, 12 HIST. POL. THOUGHT 263, 276 (1991).

It will suffice here to restate the general problem of faction, its relationship to the *nemo iudex* problem, the extended republic as a solution, and how it could be understood as proposing a solution to the *nemo iudex* problem in a republican context—the very question presented by this chapter. Publius' definition of faction should be stated in full.

> By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.[187]

Notably, language of appearance is absent from this declaration. Publius does not say, as he does in Number 37 when speaking of republicanism, that a faction "seems" to have this character. Rather, what follows is his genuine "understand[ing]" of faction. This understanding consists of three parts. First, a faction must be a group, but it can be of any size (presumably greater than one). Second, the organizing principle of the group must be a common "impulse of passion" or of "interest." (We are told later that, because there is a link between "reason"—through which opinions are formed—and "self-love," opinion and passion have a "reciprocal influence on each other." Consequently, factions formed around an "impulse of passion" would seem to include groups organized around passionately held opinions as well as passions simply.) Third and finally, the passion or interest around which the faction is formed must in substance be adverse either to private rights or the public good.[188] The faction's final object ultimately stands to benefit the faction's members either because it serves their interests or gratifies their passions or opinions. The faction is a faction precisely because its members are unable to place the

187. Fed. No. 10, p. 57.

188. For an excellent discussion of the difference between these two goods, *see* EPSTEIN, *supra* Introduction, note 18, at ___.

public good or other citizens' rights (the protection of which ostensibly serves a public purpose) above the members' private interests, passions, and opinions.

But faction becomes a problem only when it wields real political power. Thus Publius summarily dismisses minority faction as a threat: "If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote."[189] By hypothesis, a minority faction in a republic is never able to make a decision on behalf of the republic, and thus they are "unable to execute" their schemes by enshrining them in law. Minority factions are in the same position as litigants in any controversy: they take a position and advocate for it, but ultimately are not able to render a decision or pass judgment on the ultimate question. In contrast, factions that make up a majority *are* in a position to decide. They are in a position to decide precisely because the faction comprises a majority; it is republicanism as such that enables majority factions to rule in accordance with private motivation: "the form of popular government … *enables* [a majority faction] to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens."[190] Like minority factions, majority factions are interested litigants; unlike minority factions, majority factions are also in the position of judging, a position conferred upon them by the republican principle.

Publius aims to soothe the friend of popular government, who fears that the Constitution remains vulnerable to the predations of majority faction. Publius, as we saw earlier, counsels that "the *causes* of faction cannot be removed"—that is, factions cannot

189. Fed. No. 10, p. 60.

190. Fed. No. 10, p. 60-61.

be prevented from forming in the first instance.[191] Therefore "relief is only to be sought in the means of controling its *effects*."[192] The effects of a majority faction can, in turn, be controlled only by preventing "the same passion or interest in a majority at the same time,"[193] or else by rendering the majority faction "unable to concert and carry into effect [its] schemes of oppression."[194] Faction's effects can be controlled, then, either by turning a majority faction into a group that pursues the common good or else turn it into a minority faction. Number 10's great novelty is to argue that a large republic will serve both of these ends, thus disabling majority faction. At risk of oversimplification, a large republic will provide a larger pool of candidates for office and thus a "greater probability of a fit choice," meaning officials that are more likely to put the public good and private rights above the designs of faction. Similarly, the "greater variety of parties and interests" in a large republic will make it "less probable" that a majority, however unified in interest or passion, can coordinate, thus rendering it effectively a minority faction.[195] And that greater variety will, in the first instance, pose an obstacle to the formation of a factious majority.

Each of these strands in Number 10 purport to liberate republicanism from one half of the *nemo iudex* problem. Able representatives are able to distance themselves from their private motives—the paragon of republican virtue—suggesting they are not meaningfully judging in *their own* cause. And obstructing factious majorities from

191. Fed. No. 10, p. 60.
192. Fed. No. 10, p. 60.
193. Fed. No. 10, p. 61.
194. Fed. No. 10, p. 61.
195. Fed. No. 10, p. 64.

forming or communicating means, in a republican context, that the faction will not sit in *judgment* over its own cause. Either way, the thought goes, the *nemo iudex* problem is avoided.

Publius, however, carefully limits the force of this argument in Number 37. There, he seeks to temper the expectations of voters dissatisfied with the balance of power struck by the Constitution between the states and the national government. Publius provides reasons as to why a perfect delineation between the two domains could not be expected, ranging from the overly theoretical (the "obscurity" produced by "vague and incorrect definitions") to the crudely practical (there were "interfering pretensions [by] the larger and smaller States"). To this list Publius adds an important reference back to Number 10, summarizing the argument but confining it to ordinary politics.

> Nor could it have been the large and small States only which would marshal themselves in opposition to each other on various points. Other combinations, resulting from a difference of local position and policy, must have created additional difficulties. As every State may be divided into different districts, and its citizens into different classes, which give birth to contending interests and local jealousies; so the different parts of the United States are distinguished from each other, by a variety of circumstances, which produce a like effect on a larger scale. *And although this variety of interests, for reasons sufficiently explained in a former paper, may have a salutary influence on the administration of the Government when formed; yet every one must be sensible of the contrary influence which must have been experienced in the task of forming it*.[196]

Within each state and territory, a "variety of circumstances" will lead to a variety of interests and opinions. And diversity of interest and opinion will vary all the more when looking across the vast American geography. Number 37 understands Number 10

196. Fed. No. 37, p. 237-238 (emphasis added). Jacob Cooke adds a footnote after "former paper" explaining that this is a reference to Number 10.

(rightly) as stating that this type of diversity is useful to the republic insofar as it makes rule-by-faction rarer. But at the same time, this diversity has the "contrary influence"—that is to say a negative influence—when situated within the context of founding the state. We are in the unfortunate position that Publius does not elaborate why this diversity of viewpoints yields different results in ordinary politics and during the establishment of the state. He tells us only that this is a matter of which "everyone" is "sensible"—it is a matter of common knowledge. Despite this vagueness, Publius is unmistakable about his position: The extended sphere argument of Number 10 is conceded to be of limited applicability. It provides a tonic to the *nemo iudex* problem only after the government is formed. But in the founding context, the extended sphere will have the "contrary influence"—which is to say it will not only fail to defeat the *nemo index* problem, but will exacerbate it.

This is not to say that the argument presented in Number 10 is of little moment. That Publius thinks he has found an adequate safeguard against the rule of majority faction in ordinary times goes a long way to mitigating the effects of the *nemo iudex* problem. At the same time, the threat of the *nemo iudex* problem plaguing founding moments could have catastrophic consequences. Perhaps factions will arrange the government in such a way as to preference their own interests or passions in the long-run, thereby prejudicing private rights and the public good. Or perhaps a minority faction of sufficient size can obstruct public bodies from making the best available decision in the founding moment. But can a strict republic survive a faction's loading the dice in this way? (Publius comes close to saying this about the Constitution's relation to slavery in

Number 54, a passage we return to in Chapter 5.[197] And the clarity with which we are able to look back upon the secession crisis and Civil War suggests that it would be difficult for a republic to escape a faction successfully enshrining its interests in law at a founding.) And it is perhaps in these founding moments for a republic that the people's passions and interests are most inflamed and thus most similar to a democracy, which Publius roundly condemns. In any event, the extended sphere provides no protection against the threat of the *nemo iudex* problem when it perhaps matters most.

* * *

At this stage, it may seem that Publius' project to implement a strictly republican regime is doomed to failure. America deserves only a republic, yet republics are tormented by the *nemo iudex* problem without an apparent solution. Each so-called solution here either leaves the republic vulnerable to judging in one's own cause in existential ways, or else relies on institutional designs that are incompatible with republicanism. In the next chapter, we take up constitutionalism—what this essay argues is Publius' solution to the *nemo iudex* problem.

197. *See infra* Chapter 5, note 156 and text.

CHAPTER 3: CONSTITUTIONALISM

A reader may have concluded from the foregoing that, according to Publius, the prospects for popular government in America were bleak. On one hand, Americans would tolerate only a strictly republican government. On the other, strict republicanism seemed fatally vulnerable to the *nemo iudex* problem. The rescission of the Articles of Confederation and the establishment of a new system of government could, in this light, take one of two paths, each equally unsatisfactory: either compromise on the strictly republican character of the government, which would risk further rebellion and possibly revolution; or else institute a strictly republican government on one of the previously tried models, and let the regime be devoured.[1]

But *The Federalist* is an optimistic book. In the very first essay, Publius hopes to awaken readers to the truth that the Constitution represents "the safest course" for their "liberty," their "dignity," and their "honor."[2] If ratified, the Constitution would serve as evidence not only that "good government" can be established, but that it can be established intentionally and unconstrained by the necessity of the circumstances.[3]

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1. This dilemma, which Publius asserts is a false one, does however raise a historical question for Publius. Namely, if the Constitution of 1787 is an adequate example of Publian constitutionalism insofar as it preserves strictly republican rule yet avoids the *nemo iudex* problem, how can Publius explain the Civil War? If the very purpose of constitutionalism is to have strictly republican rule without the injustice that factions can inflict on one another, then to what extent does the Slavery Crisis of the mid-19th century point to a defect in constitutionalism? We can only provide a definitive answer to this question in the conclusion, however it is a significant question to keep in mind as we follow Publius' argument.

2. Fed. No. 1, p. 6.

3. For the latter reason, the establishment of the state "constitutions" (which we return to more fully in Chapter 4) is vulnerable to the point that they were constructed in the shadow of British oppression and were the products of war. Consequently, their

Failure to ratify would be "considered the general misfortune of mankind."[4] *The Federalist* takes the view that, whatever obstacles may lie in the way of popular government, they can be overcome at least to the extent that good government can be established. This implies that the apparent incompatibility between Americans' demand for a strictly republican government and the unworkability of strictly republican government is, in fact, illusory. Publius' final position is that Americans need not compromise on republicanism, for strictly republican government can avoid being corrupted by the *nemo iudex* problem.

The question then is how the impasse can be avoided. What is Publius' proposal to make strictly republican government workable? The answer of this dissertation is "constitutionalism." But that answer must broken into two steps. Initially, we must understand what constitutionalism is for Publius, which is the task of this chapter. Only then can we understand how constitutionalism is said to effectively defuse the *nemo iudex* problem, which we take up in Chapter 4.

To understand Publius' constitutionalism, some scholarly context may be useful. The history of political and legal thought points toward no single or consistent account of "constitutionalism," but three broad understandings predominate. First and most broadly, constitutionalism can be understood as "little more than the thoughtful or systematic study of constitutions and various constitutional provisions."[5] On this

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features were too beholden to circumstance, and cannot be understood as purely an outcome of free human deliberation.

4. *Id.* at 3.

5. Jeremy L. Waldron, "Constitutionalism—A Skeptical View," in CONTEMPORARY DEBATES IN POLITICAL PHILOSOPHY, 269 (Thomas Christiano & John Christman eds. 2009).

understanding, constitutionalism is not a moral or political commitment but an effort to describe the universe of "constitutions" (broadly defined). By this metric, Aristotle—who urged his students to collect constitutions from around the Mediterranean world, allegedly compiling 158 different constitutions—may be the West's first constitutionalist.[6]

Second and most narrowly, constitutionalism may simply denote a commitment or devotion to a particular governmental arrangement in a particular place (and perhaps at a particular time)—which is called "the" constitution. Thus Gerhard Casper observes that "American historians tend to use ["constitutionalism"] as a shorthand reference to the constitutional thought of the founding period."[7] But there is no reason why, in principle, devotees of any particular government cannot claim the mantle of constitutionalism. Casper is quick to point out that German constitutionalism (*Konstitutionalismus*) has been limited to the examples of constitutional monarchies of the 1800s.[8] William Allen implicitly understands Publius' constitutionalism along these lines when he associates constitutionalism with the question of federalism and its dispute between Publius and the Anti-Federalists.[9]

6. The evident source for this assertion is Diogenes Laërtius. 5 DIOGENES LAËRTIUS I.27 (listing "Constitutions of 158 Cites, in general and in particular, democratic, oligarchic, aristocratic, tyrannical"). The only draft constitution remaining is the Constitution of the Athenians.

7. Gerhard Casper, "Constitutionalism," University of Chicago Law Occasional Paper, No. 22, 3 (1987). Casper also notes that the more general German term for constitutionalism, *Verfassungsbegriff*, exists within the shadow of a single historical Constitution—that of the Weimar Republic.

8. *Id.* at 3-4.

9. *See* William B. Allen, *The Constitutionalism of "The Federalist Papers"*, 19 POL. SCI. REVIEWER 145 (1990).

Third comes a view that lies in the middle of these broad and narrow understandings of constitutionalism. According to this third view, some governmental arrangements can rightly be called constitutions, while others are undeserving of the appellation. Dieter Grimm concisely summarized this baseline in the first line of his compendium, *Constitutionalism*: "Every political unit is constituted, but not every one of them has a constitution."[10] That determination hinges on whether a government exhibits certain features, and these features are considered important because they are thought to serve a certain purpose or effectuate a certain value, such as individual freedom. This view of constitutionalism, unlike the first view, is normative, condemning some regimes as non-constitutions. Similarly, this view eschews the parochialism of the second view, understanding constitutionalism as a set of criteria that combine in the service of higher ends. As to the particulars, theorists differ as to what criteria are important in demarcating constitutions from non-constitutions. Grimm provides seven criteria, such as excluding extraconstitutional rule.[11] But other definitions abound.[12]

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10. GRIMM, *supra* Introduction, note 4, at 3.

11. (1) The constitution must make a claim to being normatively valid; (2) legal constraints must relate to political rule; (3) legal constraint must be comprehensive, excluding extraconstitutional forces; (4) constraints must act to the benefit of all persons subject to rule, not only to a sub-class; (5) the constitution must legitimate political rule; (6) "legitimacy to rule" must derive from the people who are subject to being ruled; (7) the constitution must supersede other forms of power, such as the legislature. *See id.*, at 22.

12. *See, e.g.*, Nathan Tarcov, *Ideas of Constitutionalism Ancient and Modern*, in THE SUPREME COURT AND THE IDEA OF CONSTITUTIONALISM (Steven Kautz, Arthur Melzer, Jerry Weinberger & M. Richard Zinman eds., 2009) (reviewing constitutionalism in the thought of Plato, Aristotle, Machiavelli, Locke, and Publius); Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS, 153 et. seq. (Larry Alexander ed., 1998) (listing seven indicia of constitutionalism, including that they are constitutive of the legal order, stable, written, superior, justiciable, entrenched, and express an ideology); Caspar points to at least two late-18th-century historical examples. In 1776, the town of

As may be clear by now, these three approaches to constitutionalism essentially differ on the question of what political arrangement can rightly be called a constitution. The first treats any political arrangement as a constitution. The second treats only one arrangement—or a small number of closely related arrangements—as a privileged enough to deserve the title. The third bridges this divide by providing abstract criteria for distinguishing constitutions from non-constitutions. Publius, for his part, takes up all three of these angles at different points in *The Federalist*. At times, he surveys, describes, examines, and critiques different systems of government, both extant regimes and ancient ones, and therefore might be said to fit into the first category.[13] But, in addition, *The Federalist* is primarily a defense of a particular regime—the one proposed by the Constitution of 1787—and so Publius may be said to be a constitutionalist in the second sense. The chief point of this section is to describe how Publius is also a constitutionalist in the third sense. That is, we seek to describe Publius' view of what distinguishes a constitution from a non-constitution. Without such an abstract distinction, Publius' philanthropic hope that the Constitution of 1787 would serve as an example for all mankind would be either naïve or disingenuous.

Publius stakes out three primary requirements for a government to be deemed to have a Constitution. I call these (1) founding, (2) horizontal monism, and (3) vertical

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Concord, Massachusetts resolved that a constitution served to "Secure" citizens in their rights against the government and Declaration of Rights of Man of 1789, which maintained that to be properly called a constitution a government had to guarantee certain rights and also establish the separation of powers. *See* Caspar, *supra* Chapter 3, note 7, at 4-5.

13. *See* Fed. No. 18 (Amphyctionic Council, Achaean League); Fed. No. 19 (Germanic Confederacy, Poland, Switzerland); Fed. No. 20 (Netherlands); Fed. No 39, p. 250 (posing the question of whether the Constitution of 1787 is strictly republican).

dualism. Founding requires the institutions that make up the regime to be able to trace their authority to a political act made at a single point in time. This does not entail that *all* institutions be set up at the time of the founding. Rather, founding only necessitates that political power be exercised in accordance with the original grant of power at the founding. If the power to alter the scheme of government is contained within the original grant at the founding, then the scheme may be validly altered.[14] Horizontal monism asserts that the exercise of political power—which includes force and violence, but is not confined to force and violence—is legitimate only if that exercise of power is recognized at law. In other words, horizontal monism states that assertions of political power are valid only if they follow preestablished legal channels for the assertion of political power—voting is a helpful example in the democratic context. Vertical dualism requires that the regime incorporate a hierarchy of laws, according to which there is a superior law and one or more inferior laws. Inferior law is inferior precisely because it must be authorized by and consistent with supreme law.[15] Bruce Ackerman famously bestowed

14. Perhaps too convenient by half, the obvious example here are the amendments to the U.S. Constitution, which Publius contemplated but of which he was unaware. The general point is that Article V of the originally ratified Constitution provides for a method of amendment, and all the amendments to the Constitution were themselves ratified in accordance with Article V. The validity of the amendments hinges on their being authorized by the regime as it existed immediately prior to the amendment. It stands to reason that Article V could itself be altered by a validly ratified amendment that changes the Constitution's amendment process. The authority of this new amendment (let's call it the "Amendment Amendment") would be valid because it was ratified in accordance with the immediately prior Constitution's amendment procedure—that is, Article V. Because the Amendment Amendment would be valid, proposed amendments ratified in accordance with the Amendment Amendment would also be valid, being traceable to the authority conferred upon the original Constitution at the original ratification.

15. For this reason, vertical dualism is influenced and constrained by horizontal monism, although it is not implied by it.

the title "dualist democracy" on this idea, however I will refer to it as "vertical dualism" both to distinguish it from horizontal monism and to abstract away from the republican context in which Ackerman is writing.

It should be said that Publius systematically discusses constitutionalism nowhere, so much of our work here involves making explicit what is implicit. For that reason, it is difficult to say with any certainty that Publius considered these three features of constitutionalism to be exhaustive. It stands to reason that Publius would accept the existence of additional constitutional criteria. This chapter is concerned with those features of constitutionalism that can be supported adequately by the text of *The Federalist* but are not inconsistent with it.

FOUNDING

Founding is central to Publius' political thought generally, but especially to his theory of constitutionalism. This may be for a few reasons, including that Publius might presumptuously understand himself as a founder of the American republic. The moniker "Publius" is a reference to Publius Valerius Publicola—a Roman aristocrat who, along with Lucius Junius Brutus and a few others, dethroned the last king of Rome and established the Roman Republic.[16] Albert Furtwangler smartly points out that the choice of "Publius" stood in contrast to other pen names used in the ratification debates—Cato,

16. *See* MEYERSON, *supra* Introduction, note 23, 79 (2008). Moreover, according to Plutarch—with whom the author Publius was familiar, *see, e.g.*, Fed No. 6, p. 29; Fed. No. 18, p. 111—the historical Publius was comparable to Solon, the legendary lawgiver of Athens and included in a list of "founders" in Number 38. *See* Fed. No. 38, p. 240. PLUTARCH, *Poplicola,* in LIVES OF THE NOBLE GREEKS AND ROMANS (John Dryden tr. 1906).

Brutus, and Caesar—who were *defenders* of the late Roman Republic rather than *founders* of it.[17]

But most germane for our purpose is the idea that, by providing an origination point for the political community, founding supplies a metric by which to judge whether political power is authorized and exercised within preestablished limits.[18] These are intertwined concerns—how can one begin to ask whether power is being abused without knowing where, when, and to whom power was conferred in the first place? Founding

17. *See* ALBERT FURTWANGLER, THE AUTHORITY OF PUBLIUS: A READING OF THE FEDERALIST PAPERS, 51 (1984). Of course, for Anti-Federalists this choice would have made perfect sense. Many opposed the Constitution on the grounds that it was a *threat* to republicanism and, more broadly, the cause of popular government. By their lights, they were defending authentic republicanism as it existed in the states and was, whatever its faults, protected under the Articles of Confederation. Thus for Anti-Federalists the proper classical analogy is not to the foundation of the Roman Republic, but the transition from the Roman Republic to the Roman Empire—a transition that had to be stopped.

18. For example, Publius asserts that the American government should be "founded on free principles"—that is, that the power vested in the government should not be so much as to interfere with individual rights. Fed. No. 48, p. 335. For that reason, the convention "laid its foundation on this basis, that the legislative, executive and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time." *Id.* On that basis, Publius asserts that "[t]he complete independence of the courts of justice is peculiarly essential in a *limited constitution*." Fed. No. 78, p. 524; *see also* Fed. No. 74, p. 502 (stating it is "questionable" whether "limited constitution" could accommodate delegating certain legislative powers to the president). For an additional example, in Number 39, Publius reminds readers that "[i]n its foundation" the government set up by the Constitution is "federal, not national," meaning that it is established on the basis of the people of each state, not the entire population of America. Fed. No. 39, p. 257; *see also id.* at 253-54 ("[I]t appears on one hand that the Constitution is to be founded on the assent and ratification of the people of America, given by deputies elected for the special purpose; but on the other, that this assent and ratification is to be given by the people, not as individuals composing one entire nation; but as composing the distinct and independent States to which they respectively belong. It is to be the asset and ratification of the several States, derived from the supreme authority in each State, the authority of the people themselves"). Because it is the people of each state, acting by way of their state government, that ratifies, the state government alone cannot overrule the national government.

seeks to answer these twin concerns by providing a fixed point at which a quantum of authorized power became so authorized. Consequently, no exercise of power is legitimate unless it can fairly trace itself to a founding. Founding concerns itself primarily with the *production and establishment* of legitimate political power, treating the *organization* of power as a subsidiary question.

Just as every political unit is constituted, but does not necessarily have a constitution, so too every political unit has foundations, but not necessarily a founding. The chief alternative to founding would have been political systems that integrate public power with private power. Grimm calls special attention to this fact, writing that before the constitution (as he understands the term) sprouted in 18th-century America and France, "[r]ights referred less to territories than to people," and so "bearers [of such rights] exercised them not as independent functions but as an adjunct of a certain social status."[19] Ascension to the position of *pater familias* conferred not only personal power over members of the family, but personal power over the predecessor's vassals. The crucial point is that under such systems power is largely inherited, and thus it is difficult to point to an ultimate source of authority. The English Civil War may have been a founding for an albeit short-lived state. But on what basis can a hereditary king like George III claim a founding?[20] Hence Jefferson accuses George III in the Declaration of

19. GRIMM, *supra* Introduction, note 4, at 316-317.

20. At most, hereditary monarchs (and other minor aristocrats, for that matter) can claim to have succeeded to the authority of their predecessor. But this results in something like an infinite string of questions. George III can look to George II, and so on. The English Civil War, the Glorious Revolution, the War of the Roses, and other such disputations may break the chain of authority, but ultimately each claimant of the throne asserts that they are rightfully taking or succeeding to a pre-existing quantum of political power. Ultimately, they may all look to William the Conqueror—meaning that the right of conquest is an effective transfer of power. But this does not answer the

Independence of "usurpations." But Jefferson's point is clear enough: George III's actions were not authorized, thus they are illegitimate usurpations.

Publius' preoccupation with founding is present throughout *The Federalist*. From the very first number, he tells us that the overall theoretical question posed by the issue of ratification is one of "*establishing* good government"—that is, in other words, of setting up a government.[21] Founding, however, is not new to the modern or American contexts. When first turning to the authority of the convention at Philadelphia, Publius observes that "[i]t is not a little remarkable that in every case reported by antient history … the task of framing it has not been committed to an assembly of men; but has been performed by some individual citizen of pre-eminent wisdom and approved integrity."[22] There can be no mistake that Publius here is addressing founding, for he immediately raises the

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question of *how much* or *what types* of power William seized from Harold Godwinson at Hastings. The British monarch's claim to rule must rest on an even earlier source of authority, or else on a principle like divine will, which is antithetical to restrained government.

21. Fed. No. 1, p. 3 (emphasis added). Publius' confinement of his comment to the establishment of "good" government (as opposed to the establishment of mere government) merits comment. It is unclear what weight to assign to the emphasis on good government. Just as human action subjectively aims, in some respect, at *good* action, so too the establishment of government subjectively aims, in some respect, at *good* government. This is to say that it would be strange indeed to erect a government intentionally hoping that it would not deserve the moniker "good." And Publius, for his part, appears to be of the position that there is some tension between bad government and government that can endure. "I believe it may be laid down as a general rule," he says, "that [the people's'] general confidence in and obedience to a government, will commonly be proportioned to the goodness or badness of its administration." Fed. No. 27, p. 172. While there are "exceptions" to the rule, they rely "entirely on accidental causes" *Id.* Publius does not elaborate what such accidents are—I would submit they involve force, per Number 1, and therefore chafe against popular government. But in any event, Publius concludes the thought noting that, because bad government can only command obedience through accident, they have no place in evaluating the "intrinsic merits or demerits of a constitution," and are disregarded for purposes of founding.

22. Fed. No. 38, pp. 239-40.

example of Minos, "the primitive *founder* of the government of Crete."[23] Yet Publius qualifies this observation by noting that it appears only to hold in the case in which the founding of a government is happening in accordance with "deliberation and consent," presumably the deliberation and consent of the people.[24] This locution recalls a significant question posed in Number 1: whether good government can be established by "reflection and choice"—which is comparable if not identical to "deliberation and consent"—or whether all government must be established by "accident and force."[25] Publius nowhere rules out that a regime established by "accident and force" may be said to be founded in the precise sense, leaving us with a dichotomy: a foundation may result from either accident and force or reflection and choice, but only in the latter case do we observe that the task was primarily performed by a single individual. In support of this point, Publius adds the examples of Zaleucus (Locris), Theseus (Athens), Lycurgus (Sparta), Romulus (Rome as kingdom), and Brutus (Rome as republic).

23. *Id.* at 240 (emphasis added).

24. *Id.* at 239. At the very least, the officers leading the founding are engaged in deliberation and their ultimate decision wields authority because it is given the consent of the people.

25. Fed. No. 1, p. 3. To be sure, the question posed in Number 1 is styled as if the question is, as of yet, incapable of being answered for want of evidence. The posture is that reflection and choice can be vindicated in this historical moment because the Constitution was the product of reflection and the process of ratification would constitute a choice. It may be inferred, therefore, that Publius maintains no other regime has in fact been established on the basis of reflection and choice. If correct, this would mean "reflection and choice" (Number 1) and "deliberation and consent" (Number 38) are importantly different. One way around this difficulty, though, is to observe that in Number 1 Publius is specifically addressing whether "societies of men are really capable or not of establishing good government from reflection and choice." A fair reading of these passages could maintain that Publius agrees the ancient cities discussed in Number 38 were indeed founded on reflection and choice, but that they were not capable of really establishing "good government."

Significantly, ancient examples of founding indicate that founding is "applicable to confederal governments also."[26] The Amphyctionic Council and Achaean League—both discussed in Number 18 as examples of the tendency of federations to spiral into anarchy—are fitting examples. Amphyction was the "author" of the prior and Achaeus gave the latter its "first birth."[27] But in a confederation, political power is divided between the federative body and the constituent political entities. Consequently, founding is not totalitarian in the sense that it entirely dominates a political community, excluding other forms of rule. A particular political community could, if structured correctly, be subject to powers derived from different, distinct foundings, and these foundings can be compatible with one another. According to legend, Amphyction was a king of Athens—making Athens one of the original members of the council. So, by Publius' lights, the Athenians would have been subject to two laws, each established by a single founding: the law of the council as well as the law of Theseus. The possibility of multiple foundings is not surprising, for founding concerns the allocation and authorization of some amount of power at a certain point in time. But when a founding authorizes certain powers and is silent about others, then the residuum may be addressed at a subsequent founding without jeopardizing the first.[28]

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26. Fed. No. 38, p. 240.

27. *Id.*

28. To be sure, a founding can be totalitarian in that it addresses all types of possible government powers. The Constitution, as amended, does this, carving power into three main parts. First are powers bestowed on the federal government. Whatever government powers were not given to the federal government are "reserved to the States respectively, or to the people." The powers reserved to the people are, presumably, individual and collective rights—that is, they are trumps over government power, meaning the government may not act in such a way. In summary, this arrangement addresses all possible types of government power: federal (allowed), state

On this basis, Publius regards the establishment of the Articles of Confederation amidst the separation from Great Britain as a founding. He acknowledges this directly in Number 22:

> It has not a little contributed to the infirmities of the existing fœderal system, that it never had a ratification by the PEOPLE. Resting on no better foundation than the consent of the several Legislatures; it has been exposed to frequent and intricate questions concerning the validity of its powers; and has in some instances given birth to the enormous doctrine of a right of legislative repeal.[29]

In forming the Articles, the States founded an organization with specific powers aimed at specific goals. The Articles granted the confederation, for instance, an "indefinite discretion to make requisitions for men and money"—that is, to lay taxes and conscript men for war. But at the same time the Articles failed to authorize all government power. It failed to give the confederation the "authority" to raise money or men "by regulations extending to the individual citizens of America,"[30] meaning it had the "defect" of a "total want of a SANCTION to its laws."[31] The confederation's effectual powers were limited mainly to the objects of the states in their "CORPORATE OR COLLECTIVE CAPACITIES."[32] That the Articles conferred upon a new body (Congress) limited powers, along with the fact that it came into effect at a single point in time—in March of 1781, after all states ratified the agreement—is characteristic of a founding. And while the Articles denied some

(allowed), and rights of the people (not allowed).

29. Fed. No. 22, p. 145.

30. Fed. No. 15, p. 93.

31. Fed. No. 21, p. 129,

32. Fed. No. 15, p. 93.

powers to the states, such as the sending of ambassadors to foreign states,[33] it left state authority considerably intact. Just as Athens was subject to two foundings—that of Theseus and that of Amphyction—so too the states were subject to two foundings: the founding that brought them into corporate existence in the first instance (which we address later) and the ratification of the Articles.

There is no question that the establishment of the new national government under the Constitution marked, according to Publius, a clean break from the Articles. The Articles were "founded on principles which are fallacious," namely that they did not confer upon the confederation enough energy to effectuate its aims.[34] As a result, the American people must "change this first foundation, and with it, the superstructure resting upon it."[35] Whereas the foundation set by the Articles was complementary to another foundation (that of the states), the foundation effectuated by the Constitution of 1787 would demolish the old structure and instantiate an entirely new one. Even though the Constitution of 1787 does not grant the states any powers, it does limit them.[36] In line with this, when taking up the accusation that the Philadelphia convention had no authority consistent under the Articles to propose a new framework of government, Publius retorts that the objection puts form over substance: "a rigid adherence in such cases to [form], would render nominal and nugatory, the transcendent and previous right of the people to 'abolish or alter their governments as to them shall seem most likely to

33. *See* ARTICLES OF CONFEDERATION, art. VI.

34. Fed. No. 37, p. 233.

35. *Id.*

36. *See, e.g.*, U.S. CONST. art I. § 10.

effect their safety and happiness'."[37] Even if it were wise or possible to adhere to the Articles' requirement of unanimity—with which Article VIII of the Constitution does not comport—the foundations on which each document is set are incomparable. In Number 22, Publius had noted that the Articles' foundation was the consent of the state governments; but the foundation of the Constitution would be the consent of the people. This new foundation, deeper, stronger, and wider than the foundation of the Articles, would eliminate the Articles of Confederation before it collapsed and erect a stronger structure in its place. Publius' citation to the Declaration here is apposite: just as the fledgling colonies broke from Great Britain and set new foundations in the states and ultimately the Articles, so too the Constitution would mark a total break from the system under the Articles.

At this stage, it may still be unclear what, to Publius' mind, a founding *is* and how it differs from the rules of government or even law generally. It is useful to entertain the metaphor that is at the heart of the use of the word "founding"—that of architecture. A founding is for a government what a foundation is for a building. A building could be built without a foundation, but this is likely to be precarious, and so this option should be avoided. And in laying a foundation, the builder will need to be sensitive to various concerns: where to build, the character of the ground, the purpose of the "superstructure," and any other design constraints. While these are all interrelated questions and only so much is within the builder's control, there is no question that the first place where human design and choice enter with any substance is at the stage of

37. Fed. No. 40, p. 265 (quoting Declaration of Independence).

laying the foundation. If it is not laid properly—that is, with the wrong material, dimensions, or in the wrong place—the entire structure may be in jeopardy.

Publius' theory of founding, and perhaps his theory of government more generally, can therefore fairly be called architectonic. But it contrasts with some other visions of politics as architecture. In *The Prince*, Machiavelli compares hereditary monarchy to a line of row-houses, each attached to the next by "dentations."[38] Machiavelli's image is horizontal: just as each house is held up in part by adjacent houses, the authority of each monarch turns on the authority of his predecessor and the work of his successors. In Aristotelian fashion, this invites the question of whether there is an infinite regress of houses (and thus uncertainty as to the ultimate origin of the monarch's authority) or a first monarch (who cannot appeal to a predecessor for authority). Publius' theory of founding—which employs a vertical metaphor—seeks to avoid this problem. It is true that a foundation can be laid in different ways (e.g., by the consent of the people, by the consent of the states, and so forth). But once an effective foundation is laid—that is, a foundation that is sufficiently broad, deep, and strong—then it serves as an adequate source of authority and need not be justified further.[39] There is no looking "under" the foundation.

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38. *See* MACHIAVELLI, THE PRINCE, 7 n.6 (Harvey Mansfield tr. 1998). Dentations are teethed walls that connect adjacent homes. With thanks to Nathan Tarcov, it is important to note that Machiavelli elsewhere in *The Prince* departs from this "horizontal" view of politics, and instead embraces and architecture closer to the "vertical" vision suggested by Publius. *See id.* at 25 (claiming that Hiero "could build any building on top of such a foundation.").

39. *See* Fed. No. 23, at 145-46. Publius states here that it is a "gross … heresy" to maintain that "*a party to a compact* has a right to revoke that *compact*." But because some "respectable advocates" say as much, it "proves the necessity of laying the foundations of our national government deeper than in the mere sanction of delegated authority"—that is, the Constitution should be ratified by the people.

The metaphor of regime creation as architecture is also useful in addressing a theoretical question presented by founding. That question is, given that founding asserts a point in time at which political authority is conferred, under what circumstances can the foundation be changed? We have already seen one answer to this question in the context of confederations—when a founding does not confer or deny certain powers to the governing authority, it is possible that a parallel founding can create an entity that wields those powers. But what if the original founding expressly denies to the government all powers which are not conferred at the founding? Presumably Publius' response to this will be consistent with Article V of the Constitution. In the main, Article V allows the houses of Congress and the state legislatures to propose constitutional amendments, which become effective upon ratification either by state legislatures or state constitutional conventions. When the proper procedures are followed, such amendments are to be treated "as Part of this Constitution."[40] Thus Publius' general response to this theoretical question may be that a wise founding will include provisions for alterations to the government, and powers exercised under those provisions are validly authorized the same as any other.

Publius alludes to this possibility in Number 38 in the founding examples of ancient regimes. In the case of Athens, Publius notes that it was "Theseus *first*, and *after him* Draco and Solon" who together "instituted the government."[41] The Roman monarchy, too, fits this bill: "The foundation of the original government of Rome was laid by Romulus; and the work compleated [*sic*] by two of his elective successors, Numa, and

40. U.S. CONST., art. V.

41. Fed. No. 38, p. 240 (emphasis added).

Tullus Hostilius."[42] Even Zaleucus, who is mentioned in passing as the lawgiver of the Locrians, was famous for instituting an exceedingly harsh rule for legal change. According to Demosthenes, a Locrian could not propose a new law without a noose tied round his neck; if the measure failed, he was hanged.[43] Although Publius may nevertheless have regarded these men as "legislator-superm[e]n," as Judith Shklar has said,[44] he clearly did not regard their foundings as immutable or even the work of one hand. An expert architect (or team of architects) will design a building capable of repair and adjustment.

But this cannot be the last word on amendment and change. As was said, Publius can be presumed to be writing in defense of the Constitution of 1787, and Article V carves out two exceptions to the general amendment process. The first exception prohibits a constitutional amendment affecting either the Slave Trade Clause (which itself prohibits Congress from banning the importation of slaves prior to 1808) or the Direct Tax Clause (which, by dint of the Three Fifths Clause, was directly related to the slave trade). This first exception therefore serves primarily as a backstop for the Slave Trade Clause: but for this exception to the Article V amendment process, Congress would be constitutionally prohibited from banning the importation of slaves prior to 1808 *by statute*, but could override the ban with a constitutional amendment. Critically, this first exception, according to the text of Article V, expires in the year 1808, the same year Congress's power to statutorily regulate the trans-Atlantic slave trade became constitutionally

42. *Id.*

43. *See* Demosthenes, *Against Timocrates*, § 139, available at http://www.perseus.tufts.edu/hopper/text?doc=Perseus:text:1999.01.0074:speech=24.

44. Judith N. Shklar, The Federalist *as Myth*, 90 YALE L.J. 942 (1981).

operative.[45] The second exception provides that a state's "equal Suffrage" in the Senate may not be denied.[46] Although not time-limited, this exception applies only when the relevant state does not give its consent in the first place. While each of these Article V exceptions are importantly cabined, they raise the following question: If, at a founding, a certain amount of power is denied to the government and no amendment can confer the power, how to treat a later attempt to confer that very power? Publius' answer here should also be relatively straightforward, since this is one way to understand the Constitution in relation to the Articles of Confederation. At worst, a successful conferral of the prohibited power can be construed as akin to the exercise of the right of revolution—the right to demolish the present building and to erect a new one on a new foundation.

Revolution and founding are therefore tightly linked. Because the possibility of revolution sits, however faintly, in the background of any political community, the possibility of a new foundation is always present. This connection in turn points to the implicit place of republicanism (and popular government generally) in Publius' theory of founding. Although not all governments are republican, all foundings are *in a way* dependent on the people insofar as the people acquiesce to it by not exercising their right to revolution. This is not to say that Publius' theory of founding sits entirely harmoniously with classical liberal theories of consent of the governed, according to which the people act in one mass action. "[I]t is impossible," Publius says, "for the people spontaneously and universally, to move in concert towards their object; and it is therefore

45. *See* U.S. CONST., art. V. It is worth noting that, without this temporal cut off, the Sixteenth Amendment may not have been able to alter the Direct Tax Clause.

46. *Id.*

essential, that such changes be instituted by some *informal and unauthorised propositions*, made by some patriotic and respectable citizen or number of citizens."[47] And despite its clear association with popular rule, Publius nowhere requires that a founding be affirmatively authorized by the people. Rather, founding seeks to draw a line in the sand, with the people's acquiescence, on the other side of which political authority is not to be questioned.

HORIZONTAL MONISM

Horizontal monism is the notion that for power to be exercised validly, it must be exercised in accordance with preestablished legal channels. Extra-legal assertions of

47. Fed. No. 40, p. 265. As Gary Rosen observes, theorists like Hobbes, who pioneered the idea of consent of the governed, were not concerned primarily with the question of how to establish—i.e., how to found—a new regime. (Rosen includes Locke alongside Hobbes in his essay, but this choice may be objected to on the grounds that Locke was additionally concerned with justifying the Glorious Revolution, which has a colorable claim to being a founding. I ultimately disagree with that conclusion in Chapter 4, however the proper question there is how Publius regards the Glorious Revolution. It is an entirely different matter how Locke understood it.) Although Hobbes does show attention to founding, his primary concern was to justify obedience to then-extant government. He was able to avoid addressing head-on some "embarrassing questions" regarding the "capacity and disposition" of the people to in fact give consent and erect a government. Publius was required to confront these questions more directly because *The Federalist* regards a merely prospective founding by all accounts, and one in need of justification. To solve the puzzle, according to Rosen, Publius was "forced to deal more forthrightly with the problem of equality" and ultimately compromised on the egalitarianism of Hobbes. Gary Rosen, *James Madison and the Problem of Founding*, 58 R. POL. 561, 593 (1996). For Publius, the Constitution would need to be drafted by a "select body of citizens, from whose common deliberations more wisdom, as well as safety, [could be] expected." Fed. No. 38, p. 241. While Publius' remark here regards specifically the establishment of *good* government, the remark's salience cannot be denied given Publius' general contention that *bad* government cannot be stable, especially when that bad government is popular. True, on an egalitarianism like Hobbes's government may be possible, but for Publius that radical egalitarianism would all but preclude its ability to attain good administration. For Publius, good—which is to say stable—government is in some tension with radical egalitarianism.

political power are not to be respected and, in fact, present a threat to the body politic. Whereas founding as a concept is pluralistic in the sense that a political community can be subject to the law of multiple foundings, horizontal monism excludes exercises of power not authorized by the legal regime in place. When set in the context of constitutionalism, horizontal monism maintains that only the powers authorized at the founding (or consistent with the founding, in the case of amendment) and exercised in accordance with the constitution can be respected.

At the point of departure, Publius' concept of horizontal monism may be fruitfully compared to Weber's thesis in *Politics as a Vocation*. There, Weber famously defines the "state" as that which maintains a "monopoly" on the use of legitimate physical force.[48] Weber is clear that this does not mean that legitimate violence always takes the form of the state perpetrating it directly; instead, it means that whenever force is legitimately used, it must be attached by some authorization by the state. To be sure, Weber's thesis and horizontal monism diverge in many respects—one regards violence, whereas the other regards any exercise of political power whether or not a threat of violence has yet entered the picture. But these two doctrines are comparable in how they understand legitimacy: for Publius the legitimate use of power depends exclusively on law, and for Weber the legitimate use of violence depends exclusively on the state.[49]

48. Max Weber, *Politics as a Vocation*, in THE VOCATION LECTURES, 33 (David S. Owen ed. 2004).

49. In this light, Publius may well be regarded as an enemy of the Nazi Carl Schmitt, who asserted that legality and legitimacy are not overlapping concepts. *See* CARL SCHMITT, LEGALITY AND LEGITIMACY (Jeffery Seitzer tr., 2016).

The definitive article on *The Federalist*'s horizontal monism, recently published by James Wilson,[50] describes a wide variety extra-legal behavior to which Publius was opposed. Some behaviors, such as citizens who obstruct law enforcement officers from enforcing the law or a mob that seeks to punish a citizen for an alleged crime, are affirmatively illegal. But not all extra-constitutional assertions of authority are illegal—for example, a "mass march on the legislative seat" may be lawful, but not recognized *at law* as a valid exercise of political power.[51] (For Wilson, implicit to this basic dynamic are two "tracks" of democratic decision-making—a constitutional track and an extra-constitutional track—hence he understands this framework as a "non-hierarchical dualism."[52] But because Publius rejects the extra-constitutional track of lawmaking, I suggest it is simpler to understand Publius as advocating for a kind of monism rather than dualism.) Consequently, the critical question for horizontal monism is not whether an action is lawful as such, but whether it is recognized at law as being a legitimate way to impose demands and duties on fellow citizens.

Ample historical scholarship has described the frequency of extra-legal assertions of power in the early 18th-century Anglophone world. Maier details a list of unusual exercises of extra-legal authority—including colonists tearing up tobacco plants to prevent an oversupply, securing title to land, and the destruction of brothels.[53] In 1768, a

50. James Lindley Wilson, *Constitutional Majoritarianism against Popular "Regulation" in the* Federalist, 50 POL. THEORY 449 (2021). I wish to express my thanks to Professor Wilson for first alerting me to this issue in *The Federalist*, especially Publius' focus on the political significance of Shays' Rebellion.

51. *Id.* at 3 (pagination from original manuscript on file with author).

52. *Id.* at 4.

53. *See* PAULINE MAIER, FROM RESISTANCE TO REVOLUTION: COLONIAL RADICALS AND THE DEVELOPMENT OF AMERICAN OPPOSITION TO BRITAIN, 1765-1776, at 4 *et seq* (1973). Maier

group of private citizens in Norfolk, Virginia asked a magistrate to prevent a group of elite families from traveling outside the city to be inoculated for smallpox; when the magistrate declined to do so, a faction of them "adjourned to the local taverns and began to drink heavily."[54] The threat of mob violence deterred the families from getting inoculated for a short while, but after they received the vaccine a group of citizens "recruited a mob with drum and flag proposing to drive the unfortunate women and children … to the pest house."[55] More typical assertions of extra-legal power appear to include punishments for adulterers and perpetrators of domestic violence, releasing individuals from prison, and demands for financial relief (such as from tax burdens or private creditors).[56] So common were such extra-legal actions that John Adams could write that popular tumults occurred "in all governments at all times."[57] Jason Frank has gone so far as to say that revolutionary-era American politics were "defined" by these "myriad informal expressions of popular authority."[58]

The most significant application of extra-legal authority in the years running up to the convention at Philadelphia undoubtedly was Shays' Rebellion. An over-reliance on paper currency in combination with mounting war debts created an economic crisis in which "[t]he one thing the people could see was that they were deeply in debt, and that,

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notes that riots of this sort were "extra-institutional" rather than "anti-institutional. *Id.* at 5.

54. Patrick Henderson, *Smallpox and Patriotism: The Norfolk Riots, 1768-1769*, 73 VIRGINIA MAG. HIST. & BIOGRAPHY 413, 414 (1965).

55. *Id.* at 415.

56. *See* Wilson, *supra* Chapter 3, note 50, at 6-8 (surveying literature on "direct" regulation by public).

57. MAIER, *supra* Chapter 3, note 53, 3 n.1.

58. JASON FRANK, PUBLIUS AND POLITICAL IMAGINATION, 140 (2013).

through the action of the civil courts, they were liable to be stripped of what little property they had."[59] Should that "little property" be insufficient, they would be confined to jail. Poor citizens in Western Massachusetts began shutting down courts in 1786 in the hopes that orders seizing their property or confining them to jail could not be entered. Astounded by these actions, Jay wrote to Jefferson in October of 1786: "A reluctance to taxes, an impatience of government, a rage for property and little regard to the means of acquiring it, together with a desire of equality in all things, seem to actuate the mass of those who are uneasy in their circumstances."[60] Eventually, these citizens made a full-on assault on an armory at Springfield, but were ultimately defeated by the state militia.

Publius' strongest words about extra-legal assertions of power are reserved for Daniel Shays, whom he accuses by name of "plung[ing]" Massachusetts into "civil war."[61] This accusation is not metaphorical—to take up arms against fellow citizens without the sanction of law is, in Publius' view, every bit a threat to the Union as is war among the state governments, which he argues time and again the Articles of Confederation cannot prevent.[62] Publius invokes Shays' Rebellion repeatedly throughout the text of *The Federalist*, referring to it as an "actual insurrection[] and rebellion[]," [63] a "tempestuous

59. Jonathan Smith, *The Depression of 1785 and Daniel Shays' Rebellion*, 5 WM. & MARY Q. 77, 86 (1948) (originally presented by Smith in 1905); *see also* Joyce Appleby, *The American Heritage: The Heirs and the Disinherited*, 74 J. AM. HIST. 798, 799 *et seq.* (1987).

60. John Jay to Thomas Jefferson, Letter of Oct. 27, 1786, in THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY (1890-93), III, 212 (Henry P. Johnston ed.) (quoted in DIETZE, *supra* Introduction, note 14, at 70).

61. Fed. No. 6, p. 31.

62.*See, e.g.*, Fed. No. 16, p. 100 *et seq.*; *see also* DIETZE, *supra* Introduction, note 14, at 177-192 (interpreting *The Federalist* as a treatise designed to effectuate peace among the states).

63. Fed. No. 6, p. 35.

situation, from which Massachusetts has scarcely emerged,"[64] a "domestic insurrection,"[65] and even a "treason[]" that is "connected with sedition[]."[66]

More generally, Publius tends to call all types of extra-legal assertions of political authority "insurrections," although he does use "rebellion" and "sedition" several times. Presumably, the emphasis on "insurrection" is intended to resonate with the Constitution's Militia Clause, which provides Congress the power to call out the militia to "suppress insurrections."[67] Publius "unhappily" acknowledges that insurrections and other extra-legal uses of political power are endemic to political society. They are "maladies inseparable from the body politic, as tumours and eruptions from the natural body."[68] Although "governing at all times by the simple force of law" is said to be "the only admissible principle of republican government," "experimental instruction" shows that it is not possible.[69] Horizontal monism therefore does not maintain that extra-legal assertions of power must be rendered unthinkable—only that they are illegitimate. Publius' basis for this claim turns on the need for government to maintain domestic tranquility: "An insurrection, whatever may be its immediate cause, eventually endangers all government."[70] Putting down insurrections "preserve[s] the peace of the

64. Fed. No. 21, p. 131.

65. Fed. No. 25, p. 162.

66. Fed. No. 74, p. 502. Wilson also points out that Publius' repeated use of the term "friends of government" likely is a gesture toward the Rebellion. The anti-Shays party in Massachusetts had been named "Friends of Government." *See* Wilson, *supra* Chapter 3, note 50, at 11.

67. U.S. CONST. art. I, § 8, cl. 15.

68. Fed. No. 28, p. 176.

69. *Id.*

70. *Id.*

community" and "maintain[s] the just authority of the laws."[71] Although it is preferable to meet extra-legal action with government force, at times a "well[-]timed offer of pardon" may be justified for it can "restore the tranquility of the commonwealth … [which] may never be possible afterwards to recall."[72] When Publius writes that union will be the "conservator of peace among ourselves," he means not only that it will prevent the states from making war with each other, but that it will deter vigilante citizens from using force on each other or the state.[73]

Because extra-legal assertions of political power involve private citizens acting in concert with one another, they are intimately connected with democracy, understood in contradistinction to a republic.[74] Democracy, which we stated in Chapter 2 is said to be a regime in which the people administer the government "in person,"[75] bears a relation to extra-legal action in that the people assert their authority directly. One crucial difference between them is that, in a direct democracy, the people presumably assemble as a body and make decisions at times when substantially all enfranchised citizens are capable of taking part in the deliberations.[76] Consequently, there can be little room for doubt about

71. *Id.* at 178.

72. Fed. No. 74, p. 502.

73. Fed. No 14, p. 83; *see also* Fed. No. 27, p. 173 ("The hope of impunity is a strong incitement to sedition—the dread of punishment—a proportionately strong discouragement to it").

74. *See* Martin Diamond, *Democracy and* The Federalist*: A Reconsideration of the Framers' Intent*, 53 AM. POL. SCI. REV. 52, 54 (1959).

75. *See* Fed. No. 10, p. 61.

76. At the very least, democratic assemblies meet in accordance with law, which is to say the assemblies meet at a time and place specified in advance. *See* Fed. No. 38, p. 244 (calling the "power of regulation the times and places of election" a "fatal" one); U.S. CONST. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the

whether the final decision is in fact the will of the majority. By contrast, persons engaged in extra-legal action may in fact be in the minority (or may not be enfranchised at all), leading to substantial doubt that policy achieved through extra-legal action is in fact compliant with the will of the majority (or the will of the enfranchised majority).[77]

With all of this in mind, it should come as no surprise that Publius views extra-legal action as connected to faction and thus the *nemo iudex* problem. Democracies are fertile ground for decision-making by faction in part because they involve large assemblies, but also because they admit as members citizens who are likely less capable of deliberating for the public good.[78] But extra-legal decision making is susceptible to the very same vices, being composed largely of similar citizens and engaging in groupthink, if on a smaller scale. We are reminded that Shays was a "*desperate debtor*" and had he not

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Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators"). While a democratically assembly could prospectively change the time and place for the next assembly (and could presumptively change any other procedural rule), the failure to specify when and where an assembly to be held would constructively disenfranchise many citizens. Furthermore, that some citizens do not attend the assembly on occasion or even regularly does not deprive the assembly of its democratic legitimacy, for each has the opportunity and right to exercise their share of political power.

77. *See* Wilson, *supra* Chapter 3, note 50, at 14-16 (discussing slave rebellion in particular).

78. Wilson indicates that the "incapacity for deliberative rationality stems not from any defect in individuals but from the institutional context (or lack thereof)." Wilson, *supra* Chapter 3, note 50, at 17. Extra-legal action is never depicted in *The Federalist* as being effected by a class of one. Therefore, it may be said that extra-legal action, perpetrated in groups, is always susceptible to the same vices as a democratic assembly. But we should also notice that the character and abilities of the people involved in decision-making are often said to matter. In Number 10, Publius notes that the number of representatives for the first House of Representatives "must be limited to a certain number, in order to guard against the confusion of a multitude." Fed. No. 10, p. 63. That, in turn, also depends on the likelihood that "fit characters" will be elected to office.

been one there would have been no rebellion.[79] Publius makes the relationship between extra-legal action and faction unmissable, frequently including "faction" alongside "insurrection" and "sedition" as threats to stability, peace, and the public good.[80] To be sure, faction, democracy, and extra-legal action are not identical concepts, though they are related. Factions need not be unlawful; because they are simply "a number of citizens … who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community," they may seek to exercise authority through preestablished legal institutions.[81] Indeed, Number 10 mainly contemplates the threat of faction in "public councils."[82] (That context may explain why Publius chooses to define faction in relation to "citizens" rather than persons generally. Only in extra-legal assertions of power would the involvement of non-citizens be relevant.) But Publius' point appears to be this: even

79. Fed. No. 6, p. 31 (emphasis in original).

80. Fed. No. 8, p. 48 ("The army … may usefully aid the magistrate to suppress a small faction, or an occasional mob, or insurrection"); Fed. No. 9, p. 50 ("A Firm Union will be of the utmost moment to the peace and liberty of the States as a barrier against domestic faction and insurrection"); *id.* at 54 ("the tendency of the Union to repress domestic faction and insurrection"); Fed No. 21, p. 132 ("ferments and outrages of faction and sedition in the community"); Fed. No. 29, p. 187 ("In times of insurrection or invasion … the militia of a neighboring state should be marched into another to … guard the republic against the violences of faction or sedition"); Fed. No. 85, p. 588 ("restraints which the preservation of the union will impose on local factions and insurrections"). In addition to these examples, Publius calls the "practice of secessions" to be one that is "subversive of all the principles of order and regular government … which leads more directly to public convulsions, and the ruin of popular governments." Fed. No. 58, at 397. The similarity between secession and insurrection can be seen in Number 6, where Publius compares Shays' Rebellion (an "insurrection") with the attempts in 1784 and 1787 (respectively) to carve out new states form North Carolina and Pennsylvania. Fed. No. 6, at 35. On this view, a state attempting secession through force—rather than through the legal process—would be a violation of horizontal monism.

81. Fed. No. 10, p. 57.

82. *Id.* at 56-57.

if factions can pursue their ends through valid legal channels, they can and often do resort to extra-legal action as a means to the same end. While a large republic may be effective in defeating factions in government, this may have the side-effect of pushing factions toward extra-legal action. But as we have said, this undermines the authority of the government and the peace that government is meant to preserve. In this light, extra-legal action presents another iteration of the *nemo iudex* problem. Speaking of demagogues who lead popular movements, Publius warns against those who "sacrifice the national tranquility to personal advantage, or personal gratification."[83] Because extra-legal action involves (some of) the people judging in their own cause—pursuing their own interests or passions—and taking matters into their own hands, it presents a threat to popular government, just as the devices reviewed in Chapter 2 present threats.[84] As a component of constitutionalism, horizontal monism seeks to defeat the *nemo iudex* problem as it arises in the case of extra-legal assertions of political authority.

Although extra-legal assertion of political power displays a strong affinity for democracy, horizontal monism does not. Abstractly, any totalitarian regime would need to invoke horizontal monism in order to reject extra-legal appeals to authority, though totalitarianism need not invoke constitutionalism. Yet Publius is a republican and so consistent with the Declaration of Independence he concedes that horizontal monism is

83. Fed. No. 6, at 29.

84. Unlike the devices discussed in Chapter 2, extra-legal action does not take the form of instituting popular rule *through government*. Extra-legal action, by contrast, by definition asserts the will of "the people" outside established legal channels. But it appears more as an inescapable character trait of communities governed by popular rule, rather than as an attempt to actually effectuate popular rule.

qualified externally by the right of revolution. Should the government "betray their constituents,"

> there is then no resource left but in the exertion of that original right of self-defense, which is paramount to all positive forms of government… . [i]f the persons entrusted with supreme power became usurpers, the different parcels, subdivisions or districts of which it consists, having no distinct government in each, can take no regular measures for defence. The citizens must rush tumultuously to arms, without concert, without system, without resource; except in their courage and despair.[85]

Notice here that Publius represents the oppressive rulers as "usurpers"—a government that warrants revolution may not even be a government in the true sense.[86] One might even say that the right of revolution isn't in truth an exception to horizontal monism; it is responding to extra-legal action by rulers—the "usurpers"—with extra-legal action. After all, the right of revolution is "paramount" to all "positive" forms of government, including a constitution. If the prior regime has a constitution, then the exercise of the right of revolution is premised on the notion that the rulers already have corrupted or displaced that constitution. For example—as we saw in the prior section—Article V of the Constitution of 1787 signs away the people's right to amend it with regard to only two matters: Congress's inability to prohibit the slave trade prior to 1808 (and associated direct tax provisions), and the equal representation of the states in the Senate. An amendment (perhaps proposed and ratified by state legislatures) in violation of Article V would be extra-legal, and thus would politically (though not morally) justify an

85. Fed. No. 28, pp. 178-79.

86. Note that calling something a usurpation relies on the sociological fact that the people are "enlightened enough to distinguish between a legal exercise and an illegal usurpation of authority." Fed. No. 16, pp. 103-104.

exercise of the right to revolution. From the perspective of constitutionalism, then, the right of revolution is not so much an exception to horizontal monism as it is the consequence of a particular kind of breach of horizontal monism.[87]

The constitution defended by Publius aims to instantiate horizontal monism in numerous ways. Some are textual, such as the Militia Clause (allowing Congress to put down insurrections). Others are structural, such as Publius' argument that the "ENLARGEMENT of the ORBIT" of politics into an extended union will obstruct the effects of faction, including the those of factions acting extra-legally.[88] Horizontal monism aims to consolidate political power into a single silo and rejects extra-legal assertions of political power over others.

VERTICAL DUALISM

Vertical dualism is the concept that political decisions can be made on two distinct tracks ("dualism") and that one track is subsidiary to and authorized by the other ("vertical"). Law is therefore cleaved into two bodies—a superior law and an inferior law,

87. For Publius whether an uprising is a revolution or is condemnable extra-legal action seems to depend, to some extent, on the outcome. That is, if a popular uprising is successful and overthrows the government, it is a revolution; if not, it is an insurrection. The justification for this position is that, if "the general government should be found in practice conducive to the prosperity and felicity of the people," then it would be "irrational" to expect they would be "disinclined to its support." Fed. No. 28, 176. That is, a government that has overreached or abandoned its duties to the people will fail to attract enough popular support to repress an uprising. While this is not quite rule of the majority, it allows force to stand in as a proxy for the majority.

88. Fed. No. 9, p. 52; *see also* Wilson, *supra* Chapter 3, note 50, at 14-15. Harold H. Bruff finds special meaning in Publius' use of the scientific term "orbit," noting that it draws attention to security and regularity, even in the face of a "fractured government in a fractured society" potentially bereft of "the kinds of civic virtue and service of the public interest" needed for a republic to survive. Harold H. Bruff, The Federalist Papers: *The Framers Construct an Orrery*, 16 HARV. J. L. & PUB. POL'Y 7, 12 (1993).

which are often called respectively "constitutional" law and "statutory" law. After 1789, vertical dualism has been embedded in the American political structure: Article VI established that "This Constitution" shall be the "supreme law of the land."[89] And not only that, but Article VI also states that federal statutes are entitled the same status only if they "shall be made in Pursuance" of "This Constitution."[90] As Chief Justice Marshall immortally declared, "an act of the Legislature repugnant to the Constitution is void"—indeed, it "is not law."[91] Vertical dualism's central feature is that it entrenches and ossifies certain political decisions into the superior law and, because inferior law must be authorized by and comply with superior law, thereby constrains the types of decisions that can lawfully be made during the inferior lawmaking process. Vertical dualism subordinates both inferior law and the inferior law*makers* to higher law.[92]

At the outset, it may be particularly unclear what purpose vertical monism serves. As a result, it is worth interrogating the alternative to vertical dualism, which we might call "vertical monism" (in order to distinguish it from both vertical dualism and horizontal monism). This view maintains that lawmaking should be conducted in one mode alone. As a result, it is difficult if not impossible to find a limiting principle on the

89. U.S. CONST., art. VI.

90. *Id.* The emphasis at the end of the Supremacy Clause on the states ("Judges in every State," "any Thing in the Constitution or Laws") may give the impression that the Clause constrains state more than federal law. But, as we have just observed, the Supremacy Clause also elevates federal statutory law above state law, but only to the extent that such federal laws are "made in Pursuance" of the Constitution. The Constitution is superior to federal statutory law, which is in turn superior to state constitutional and statutory law.

91. Marbury v. Madison, 5 U.S. (1 Cranch) 177 (1803).

92. *See* Jutta Limbach, *The Concept of the Supremacy of the Constitution*, 64 MODERN L. REV. 1 (2001) ("[T]he supremacy of the constitution means the *lower ranking* of statute; and that at the same time implies the *lower ranking* of the legislator").

lawmaking authority other than the procedural rules of the legislative body. H.L.A. Hart, though not an advocate of vertical monism, called this limit the "rule of recognition."[93] For Hart, the purpose of the rule of recognition is to "govern the way in which the primary rules [of the regime] are made, changed, applied, and enforced."[94] To be sure, Hart understood that every legal regime has a rule of recognition—without one it would be impossible to tell law from not-law, thus Hart's theory harbors no special place for vertical monism. But vertical monism does hold the rule of recognition in high regard, for the rule of recognition in a vertical monist legal system is the only constraint on lawmaking. The rule of recognition theory states that it is only through *procedures* that we can distinguish between law and not-law, and thus the sole constraint on vertical monism is procedural: only if lawmaking (or law enforcement) is in violation of the procedures can it be said to not be law. By submitting only to procedural constraints, vertical monism therefore rejects substantive constraints on lawmaking.[95]

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93. *See* H.L.A. HART, THE CONCEPT OF LAW (1964). For a general introduction to Hart's theory, and a critique of it, see SCOTT SHAPIRO, LEGALITY, 79-117 (2013). For a collection of essays on the application of Hart's recognition theory to American constitutionalism, *see* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION (Matthew Adler & Kenneth Einar Himma eds. 2009).

94. Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, 50 NOMOS 3, 12 (2011). For clarification, Waldron understands the rule of recognition to be a "secondary rule," whereas the rules actually promulgated by the government (in compliance with the rule of recognition) are "primary."

95. It is not necessary here to develop a robust theory of the legal distinction between substance and procedure. Even the federal courts have struggled to consistently and coherently articulate a hard distinction between procedure and substance. *See* Jay Tidmarsh, *Procedure, Substance, and* Erie, 64 VAND. L. REV. 877, 896-97 *et seq.* (2011) (describing three different ways to distinguish between procedure and substance in cases implicating the *Erie* doctrine). Here, it suffices to point out that for Publius procedure would have been easily distinguishable from the substance subjects of common law: property, tort, contract, criminal law, and restitution. Additionally, the intuitive point that procedure regards the rules of court can be translated over to the legislative context. For vertical monism, the rules that regulate the lawmaking process

It is worth pausing here to consider two potential external limitations on vertical dualism: divine law and natural law. If effective, each of these may be thought to present a sufficient constraint on vertical monism as to render vertical dualism unnecessary. The thought is this: if the members of the body with, by virtue of vertical monism, the power to change all rules[96] each feel compelled by divine or natural law to rule in a certain way, then vertical monism may not be very threatening at all. Publius, for his part, asserts the existence of such laws and expressly invokes the "transcendent law of nature and of nature's God" as justification for the claim that the Articles of Confederation may be "superceded" without the unanimity of the states.[97] (Moreover, under this formulation, it is hard to detect a distinction between divine law and natural law.) Publius' objection to divine and natural law is that they cannot effectively constrain rulers; they provide no adequate or reliable constraints on human behavior generally. When nature or God are mentioned in *The Federalist*, it is typically in one of two contexts. First, God and nature are portrayed like Homeric deities intervening in human and natural history, shaping the geography of the country,[98] the outcome of war,[99] and indeed the proceedings of the

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are those that affect the legislative chamber. They do not regard the ultimate rights and obligations altered by the statute—and therefore may be said to not be substantive.

96. Except that they may not change the rule of recognition retroactively.

97. Fed. No. 43, p. 297. The language here is an obvious reference to the Declaration, which states in the first paragraph that the "Laws of Nature and of Nature's God" entitle the thirteen states to a "separate and equal station" "among the powers of the earth." That said, both Publius' belief in the existence of God (and, downstream of it, divine law) as well as the robustness of his view of natural law may admit of some doubt. In that case, this comment may simply be a patriotic homage to America's founding document, meant to curry favor with voters in New York.

98. *See e.g.*, Fed. No. 2, p. 9 ("Providence has in a particular manner blessed [America] with a variety of soils and productions, and watered it with innumerable streams, for the delight and accommodation of its inhabitants").

99. Fed. No. 37, p. 238 ("It is impossible for the man of pious reflection not to perceive in

Convention.[100] But there is no space for human choice in these portrayals, and so divine and natural law would have no role, from this point of view, in warding government action away from abuse. Second and more helpfully, divine and natural law are represented as guideposts for humans to determine which actions are right, just, and good.[101] In this context, divine and natural laws serve as *justifications* for taking (or not taking) certain actions. But there are also two problems with this use of divine and natural law: (1) Publius says the content of natural and divine law is "dim and doubtful" due to the "cloudy medium through which it is communicated" (human speech), meaning the requirements of divine and natural law are often uncertain;[102] and (2) whether or not an action is *justified* is a distinct question form whether the actor can be expected to take the

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[the Constitutional Convention, a finger of that Almighty hand which has been so frequently and signally extended to our relief in the critical stages of the revolution").

100. *Id.*

101. The obvious example here is the line we just noted from Number 43, for there Publius invokes a divine and natural law as a justification for ignoring the unanimity requirement for amending the Articles. Fed. No, 43, p. 297. But Publius makes similar statements about the justificatory nature of natural law throughout *The Federalist. See*, Fed. No. 28, p. 178 (referencing "the original right of self-defense, which is paramount to all positive forms of government"). But the most comprehensive statement of this position appears at the beginning of Number 31. There, Publius begins stating that "in disquisitions of every kind there are certain primary truths or first principles upon which all subsequent reasonings must depend" Fed. No. 31, p. 193. The basis for truths is "antecedent to all reflection," and failure to recognize these truths must be attributed to a "defect or disorder in the organs of perception" or else an interfering passion, interest, or prejudice. *Id.* at 193-94. One category of such truths are "maxims in ethics and politics." *Id.* Helpfully, Publius describes a few of them—that "the means ought to be proportioned to the end," that "every power ought to be commensurate with its object," and so forth. *Id.* Publius' use of the word "maxim" here is instructive—as true as these propositions may be, they are just principles from which a right action can and should be derived—they are justifications. For a general discussion of Publius' view of moral principles (including natural law), *see* WHITE, *supra* Introduction, note 25, at 25 ff. (1987) (describing Publius' "rationalism," as derived from Locke, in moral matters).

102. Fed. No. 37, p. 236-37.

action. The latter problem appears throughout *The Federalist*, but the decisive (and most celebrated) statement on this point cannot be clearer: if "men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary."[103] That we need government indicates man's fallen character—as an ordinary member of society, we do not expect him to reliably choose the good—meaning government must be instituted to channel his behavior. But the government in turn must be staffed also by human beings, who cannot be trusted with the power bestowed upon them. Additional checks are required on officers of government for the same reason that government is required in the first instance. Men cannot be trusted or expected to abide by divine or natural law—only angels can.

The concrete example of the British regime may be useful here in understanding vertical monism. Although various documents of considerable significance, such as Magna Carta, the Petition of Right, and the Habeas Corpus Act all instantiated private substantive rights, the Glorious Revolution of 1688-89 was settled in favor of the general principal of "parliamentary sovereignty." According to Blackstone, Parliament—which included not only the Commons, but also the Lords and the monarch—had

> sovereign and uncontrollable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical, or

103. Fed. No. 51, p. 349. The view can also be seen clearly from Number 10, where Publius states that the genesis of faction is that the "reason of man continues fallible," being corrupted by the connection between "his reason and his self-love." Fed. No. 10, p. 58. His self-love, in turn, is related to his opinions, passions, and interests, which Publius says later can interfere with the apprehension of basic moral truths. *Id.*; Fed. No. 31, p 193-194. This view of man as subject to his own interests and passions, around which government needs to be planned, has served partly as the basis for liberal readings of *The Federalist* and the American founding more generally. *See generally* LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA (1951).

> temporal, civil, military, maritime, or criminal: this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms.[104]

Indeed, Parliament is so powerful that it can, "change and create afresh even the constitution of the kingdom and of parliaments themselves"; in short, it can do "every thing which is not naturally impossible."[105] Dicey summarized the doctrine as giving Parliament "the right to make or unmake any law whatever, and, further, that no person or body is recognised by the law of England as have a right to override or set aside the legislation of Parliament."[106] The only restriction on Parliament is the rule of recognition—the complicated set of rules that govern the internal operations of the King-in-Parliament. This is because, without the constraint of internal procedure, it would be impossible to distinguish between an act of Parliament (which is by definition valid under the doctrine of parliamentary sovereignty) and a non-act. Though subject to the rule of recognition, Parliament's powers are so great that it can alter or amend the rule of recognition, at least prospectively. Regimes based on vertical monism are subject to only one outside constraint—the rule of recognition—and therefore provide for no substantive

104. BLACKSTONE, COMMENTARIES, at *160. However, some have argued that Blackstone's striking definition here does not imply that he was a proponent or defender of arbitrary power. Instead, "his emphasis on procedural due process (especially habeas corpus)" provided some moderating force on Parliament's infinitely broad powers. Howard L. Hubert, *Sovereignty and Liberty in William Blackstone's "Commentaries on the Laws of England*," 72 R. POL. 271, 274 (2010). Thus while Parliament's legislative powers were infinite, it relied in the end game on courts to enforce its laws, and courts had the de facto discretion to moderate the application of those laws via process.

105. *Id.*

106. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION, Part I, Chapter I, p. 3-4 (1885), https://files.libertyfund.org/files/1714/0125_Bk.pdf.

protections against arbitrary rule.[107] Bruce Ackerman calls parliamentary sovereignty the "brooding omnipresence" of vertical monism. For from the point of view of the vertical monist, the British regime is the very "essence of democracy."[108]

But Ackerman's most important contribution has to do with his effective recovery of vertical dualism from the Founding's political thought.[109] For Ackerman, vertical dualism is concisely understood as maintaining that there are "two different decisions that can be made in a democracy": one, "by the American people"; the other, "by their government."[110] Of course, the decisions of the people's government (inferior law) must yield to the decisions of the people themselves (the higher law), because the former is an act merely derivative of the people's sovereignty—it is not a direct exercise of their will. To stabilize this idea, Ackerman observes that higher lawmaking occurs quite rarely,

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107. Notwithstanding this, the British regime was regarded in the 18th century as the freest in Europe. Montesquieu, for example said the British regime had "for the direct end of its Constitution, political liberty." MONTESQUIEU, THE SPIRIT OF THE LAWS, XI.5. This may be accounted for by the observation that the rule of recognition in the British regime was the mixed regime and afforded each class of society input on legislation. At the same time, Limbach pointed to Sir Edward Coke's opinion in *Bonham's Case* as evidence that judicial decisions could chip away at parliamentary sovereignty. *See* Limbach, *supra* Chapter 3, note 92, at 5 n.22.

108. BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS, 8 (1991).

109. To be clear, Ackerman simply uses the term "dualist democracy" to refer to the same concept, though "dualism" is often used for short. *See id.* at 6. In this dissertation, we append the modifier "vertical" in order to provide a helpful visual to distinguish vertical dualism from horizontal monism. Additionally, it is hard to describe the significance that Ackerman's work on dualism bears in late 20th- and early 21st-century constitutional theory. *See, e.g.*, Gerard N. Magliocca, *The Philosopher's Stone: Dualist Democracy and the Jury*, 69 U. COLO. L. REV. 175 (1998); Keith E. Whittington, *From Democratic Dualism to Political Realism: Transforming the Constitution*, 10 CONST. POL. ECON. 405 (1999); Rivka Weill, *Evolution v. Revolution: Dueling Models of Dualism* (54 AM. J. COMP. L. 429 (2006) (comparing American dualism with British dualism as developed beginning in the 19th century).

110. ACKERMAN, *supra* Chapter 3, note 108, at 7.

because to speak in the name of the people requires the agreement of an "extraordinary number" of the citizens—an alignment procured only after considerable time and resources have been devoted to the matter.[111] This point will be critical to the argument of the next chapter.

When Ackerman focuses his efforts on *The Federalist*, he explores Publius' dualism as a middle ground between a view that encourages the people to make decisions on a continuing and indefinite basis ("permanent revolution") and a view that all decisions should be made by the new government, without direct intervention by the people ("revolutionary amnesia").[112] Publius navigates this Scylla and Charybdis by recognizing that "the future of American politics will not be one long glorious reenactment of the American Revolution."[113] But if the "revolution which has no parallel in the annals of human society" was not to be fought in vain, then the regime erected in its wake would need to accommodate, to some extent, decision-making by the people.[114] Dualism accommodates both of these ideals. It incorporates the direct rule of the people and the revolutionary spirit underpinning such rule by allowing for superior lawmaking. At the same time, it understands that such direct rule, if realized on a regular basis, would undermine the stability of government, and thus day-to-day governance is conducted by indirect representatives of the people.

Ackerman's reading of *The Federalist*'s vertical dualism may be right—it does seem to be the case that Publius is concerned with preserving the spirt of the Revolution by

111. *Id.* at 6.
112. *Id.* at 171.
113. *Id.* at 172.
114. Fed. No. 15, p. 89.

cementing the states into a Union, thereby protecting rule of the people.[115] This position is consistent with Epstein's important observation that Publius is friendly to republican government because he is convinced that human beings have a "proud determination to rule, rather than merely be ruled well."[116] Vertical dualism gratifies this "determination" because it leaves the creation of superior law ultimately in the hands of the people, not only in their representatives. To be sure, American vertical dualism also gratifies this "determination" by making the ordinary lawmaking process republican: the people retain a check on their representatives through elections and impeachment, which are part of the inferior lawmaking process. The critical point here is that the spirit of self-rule that inspired the Revolution is protected under American vertical dualism by way of the people's right to enact superior law; had republicanism only been instantiated at the level of inferior lawmaking, the people's determination to rule could be rendered nugatory by whatever body possessed the superior lawmaking authority.

In contrast to Ackerman's reading, according to which vertical dualism preserves the democratic spirit of the Revolution, Publius' own words about vertical dualism reveal a more immediate preoccupation with preventing abuse, in particular by setting down into law various substantive decisions that constrain ordinary or channel ordinary politics. Thus, for Publius, the most important characteristic of vertical dualism is that it

115. "Was then the American revolution effected, was the American confederacy formed, was the precious blood of thousands spilt, and the hard earned substance of millions lavished, not that the people of America should enjoy peace, liberty and safety; but that the Governments of the individual States, that particular municipal establishments, might enjoy a certain extent of power, and be arrayed with certain dignities and attributes of sovereignty?" Fed. No. 45, p. 309.

116. DAVID F. EPSTEIN, THE POLITICAL THEORY OF *THE FEDERALIST*, 124-125 (1984).

provides a way to check government excess—excess that vertical monism is powerless to prevent.

Publius' argument for vertical dualism and against vertical monism is stated most clearly—and caustically—in Number 53. There, he raises the "important distinction" between a constitution "established by the people, and unalterable by the government; and a law established by the government, and alterable by the government."[117] Though this distinction is "well understood in America," it "seems to have been little understood and less observed in any other country."[118] This distinction can be translated into the distinction between vertical dualism and vertical monism. (For the moment, we can disregard the point that Publius couches the distinction in the language of popular rule. As we will see shortly, vertical dualism may be particularly compatible with popular rule and republicanism more specifically, but it is not an inherently popular design of government.) The best example of the latter, Publius says, is the British regime. Echoing Blackstone, Publius says that in Britain "it is maintained that the authority of the parliament is transcendent and uncontroulable."[119] It is so not only regarding the "ordinary objects of legislative provision," but also as to "the constitution"—which may be rendered here as whatever fundamental rules to which Parliament is accountable.[120] Indeed, "several" times, Publius says, Parliament has altered "by legislative acts, some of the most fundamental articles of the government."[121]

117. Fed. No. 53, p. 360.
118. *Id.*
119. *Id.* at 361.
120. *Id.*
121. *Id.*

As we discussed in Chapter 2, the most egregious examples regard Parliament's changes to the terms of their own election. The Commons "continued themselves in place four years beyond the term for which they were elected by the people"—that is, to deem the prior election to be an election for a seven-year term rather than a three-year term.[122] If such an act is valid, what can stop Parliament from extending their term for life?[123] Publius points out that the Septennial Act provoked a "very natural alarm in the votaries of free government"; but that alarm was all the greater because Britain could be considered a nation where "the principles of political and civil liberty have been most discussed" and where "we hear most of the rights of the constitution."[124] Even Britain, a nation on the forefront of the rule of law and constitutionalism, had no defense against the excesses of vertical monism.

What is the remedy? Aware of the "dangerous practices" of Parliament, the votaries of free government—among whom Publius counts himself—must "seek for

122. *Id.* This is a reference to the Septennial Act of 1716, overturning a 1694 Act providing for a maximum Parliamentary term of three years. The Septennial Act stated that "this present Parliament, and all Parliaments that shall at any time hereafter be called, assembled, or held, shall and may respectively have continuance for seven years, and no longer." 1 Geo 1 St 2 c 38. It thereby extended the maximum term of Parliament for the sitting Parliament as well as future Parliaments. The Tory reaction to the Septennial Act was swift, which Lord Nottingham accusing it of showing a "distrust of the affections of the people, and an intention of governing by fear." Max Skjönsberg, *Ancient Constitutionalism, Fundamental Law and Eighteenth-Century Toryism in the Septennial Act (1716) Debates*, 40 HIST. POL. THOUGHT 270, 279 (2019) (see subsequent pages for various Tory comments maligning the Septennial Act).

123. Thomas Paine claimed, consistent with our point here, that the Septennial Act "shews there is no constitution in England." THOMAS PAINE, RIGHTS OF MAN (1791), https://oll.libertyfund.org/title/paine-the-rights-of-man-part-i-1791-ed ("It might, by the same self-authority, have sat any greater number of years, or for life")

124. Fed. No. 53, p. 361.

some security to liberty" against these dangers.[125] That security is a superior law to which ordinary lawmaking is subject.

> Where no constitution paramount to the government, either existed or could be obtained, no constitutional security similar to that established in the United States, was to be attempted. Some other security therefore was to be sought for; and what better security would the case admit, than that of selecting and appealing to some simple and familiar portion of time, as a standard for measuring the danger of innovations, for fixing the national sentiments, and for uniting the patriotic exertions. The most simple and familiar portion of time, applicable to the subject, was that of a year.[126]

One might think that a rule of recognition that sets popular elections at short lengths would be enough to constrain a vertically monist regime. But the case of Parliament shows that is not so—short tenures of office *alone* are not adequate restraints against unruly governments. Something more is needed, namely a "constitution paramount to the government." "What necessity can there be," Publius asks the partisans of year-long terms of office, "of applying this expedient to a government, limited as the federal government will be, by the authority of a paramount constitution?"[127] The argument here is a sleight of hand: earlier in the passage Publius had stated in passing that frequent elections is a "corner stone" for the votaries of free government. But we learn that this cornerstone is unneeded (and perhaps ineffective) in a regime with vertical dualism. The votaries of free government will seek an effective remedy to the dangers of vertical monism in the differentiation of two tracks of lawmaking. This will afford them

125. *Id.*

126. *Id*

127. *Id.*

not only procedural protections, such as fixed terms, but whatever substantive protections the superior lawmaking authority considers important.

Up to this point, vertical dualism has consistently been represented in the republican context. That is, it has been assumed that the superior lawmaking authority is accomplished by the people and that inferior lawmaking can be done by representatives of the people. This should come as no surprise since Publius believes only a republican regime would be defensible for the Americans. (And Ackerman, for his part, is writing about American constitutional law, so republicanism is embedded in his view of vertical dualism.) But need this be the case? Theoretically, the answer should be no. As Grimm observes, "*hierarchilization* of legal norms does not itself produce *constitutionalization*."[128] Presumably, this is because hierarchies of legal order have existed since time immemorial in cases where everyone agrees there is no republican element. The cleanest example of this would be feudal societies with a monarch, beneath which are various strata of higher and lower nobility, each with their own increasingly smaller sphere of influence. Publius hints at that possibility when he introduces the example of parliamentary sovereignty as an offense against limited government. "Wherever the supreme power of legislation has resided," he says, "has been supposed to reside also, a full power to change the form of government."[129] This tentatively suggests that vertical dualism can be adapted to all regime types. For example, the British regime could become vertically dualist if parliament retained the power to make superior law, but delegated the power to make inferior law to a new body. But notice that this move may do nothing to affect the

128. *See* GRIMM, *supra* Introduction, note 4, at 6.

129. Fed. No. 53, pp. 360-61.

republican character of the British regime—it could remain the case that it retains "one republican branch only"—the Commons.[130] Vertical dualism, therefore, may show an affinity for republicanism, but it can obtain in non-republican regimes.

In fine, vertical dualism sets out a "fundamental law that contains limitations on the authority" of the government.[131] In turn, the government must abide by the fundamental law when it crafts inferior laws. This implies that the means of changing the superior law must be different and likely more onerous than the means of changing inferior, government-made law. As Ackerman emphasized, vertical dualism is just as much about the existence of two laws in a hierarchical relation is it as about two different *tracks* of making law, one beholden to the other.

THE CONSTITUTIONAL TRIPOD

The claim of this chapter is that, for Publius, a constitution arises when three distinct governmental features coincide: a founding, horizontal monism, and vertical dualism. But we have yet to address how these three features interact and what overall purpose constitutionalism is designed to promote. It is helpful to think of each feature as one leg of a three-legged stool. Each performs a distinct function, filling in a gap in functionality that the other two cannot accomplish (individually or in conjunction). Consequently, when all three features coincide, they reinforce one another and serve a common goal: opening up the possibility of a government defined and limited in its powers. Without a leg, the stool cannot stand.

130. Fed. No. 39, p. 251.

131. GEORGE W. CAREY, THE FEDERALIST: DESIGN FOR A CONSTITUTIONAL REPUBLIC, 128 (1989).

Founding regards the origin of power. It states that any power not authorized at the founding may not be exercised by the government, whose origin point is the founding. Horizontal monism, for its part, asserts that only a single body of law can govern the community, and any exercise of power outside of that body of law is definitionally invalid.[132] Finally, vertical dualism cleaves lawmaking into two parts—one subsidiary to the other—for purposes of keeping the government, which governs on a day-to-day basis, in check.

But each of these features has gaps. Because founding regards the origin of authorized power, it does not address whether *other* powers could have been bestowed at some other time; similarly, founding does not seek to regulate the government's use of duly authorized powers on an ongoing basis. Horizontal monism and vertical dualism each seek to address those concerns. Horizontal monism also has gaps. Horizontal monism is unconcerned with the origin of powers granted to the government, and therefore cannot claim definitively whether a government's powers were authorized or not from the start;[133] moreover, it gives no assurance that lawful assertions of political

132. Although founding and horizontal monism seem similar, recall that a state can be subject to multiple foundings. *See supra* at 156. From the perspective of founding, there is nothing contradictory about an individual (or government body) being subject to powers that derive from two (or more) separate foundings, though this is anathema to horizontal dualism, which asserts that only one body of law may prevail. Similarly, horizontal monism appears unconcerned with the origin of the body of law that controls the society—though this is precisely the concern of founding.

133. For this reason, horizontal monism may in fact be incapable of policing whether powers are indeed exercised legally or illegally. Recall that horizontal monism rejects as invalid all assertions of political power outside preestablished legal avenues. The critical word, though, is "preestablished." While some assertions of political authority—such as voting or serving on a jury—may meet this threshold because they have been practiced continuously for a long period of time, it may be the case that some other assertions of political authority have been abandoned and forgotten. Thus any assertion of political power that appears new can always claim that its form was preestablished

power will not be abused. Founding and vertical dualism address these concerns. Finally, vertical dualism also has its gaps. Although superior law authorizes and constrains inferior law, it makes no inherent claims about the origin of higher law (such as whether it must come from the people or not); in addition, it is silent as to whether valid exercises of political power can exist outside the dualist framework. Founding and horizontal monism each address these deficiencies. When these three institutional features are combined, the regime is protected from (i) backward-looking disputes about where, if anywhere, political power originated, (ii) assertions of political power external to the regime, and (iii) abuses of properly vested political power that may arise internal to the regime's operations. Constitutionalism gives the regime a purpose, and constrains behavior both internal and external to the regime so that that purpose might be achieved. Each leg of the stool is needed to support the seat.

Though Publius does not address the combination of these features directly, the closest he comes is his discussion of judicial review (which we return to more fully in Chapter Five). There, he is concerned with constitutional change over time, both through a revolution that might "alter or abolish the established constitution" or the pre-established amendment process.[134] Though the people retain these rights, Publius says,

> it is not to be inferred from this principle, that the representatives of the people, whenever a momentary inclination happens to lay hold of a

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but became outmoded—which would make it difficult to say whether the assertion of power is lawful or not. Horizontal monism's only way out of this conundrum would seem to be that a power is only "preestablished" and therefore lawful if it is currently being practiced as lawful. But this kind of anti-novelty doctrine raises a host of theoretical problems, not the least of which is that it consciously over-narrows what is considered to be legal. *See generally* Leah Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407 (2017).

134. Fed. No. 78, p. 527.

> majority of their constituents incompatible with the provisions of the existing constitution, would on that account be justifiable in a violation of those provisions; or that courts would be under a greater obligation to connive at infractions of this shape, than when they had proceeded wholly from the cabals of the representative body. Until the people have by some solemn and authoritative act annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it, prior to such an act.[135]

In this statement we find all three features of constitutionalism implicit. Vertical dualism is addressed most plainly, for the officers of the government—representatives and judges—may not annul the higher law of the constitution, even when they claim the support of the people. Horizontal monism is implicated, for the people are bound by the existing constitution and may not work around it, except in the case of a revolution. They may, however, "change[] the established form" of the constitution—that is, not abolish it, but merely amend it—if they follow proper procedures. Should they not follow the proper amendment procedures, they would render the constitution not "binding." Finally, the passage points in the direction of founding in a few ways: superior law is made through "solemn and authoritative act[s]" by the people, rather than from customs or practices that have existed since time immemorial; these popular acts give powers to the government, but also constrain them; finally, though these acts give powers to the people (such as the right of amendment), they also limit the ways in which the poeple can make superior law.

I conclude this chapter by answering three questions that may linger for some readers about Publius' constitutionalism as described here. First, to what extent are

135. *Id.* at 527-28 (emphasis added).

founding, horizontal monism, and vertical dualism exhaustive features of Publian constitutionalism? That is, does it remain possible that there are other essential features of constitutionalism for Publius beyond these three? Prominent candidates may be the separation of powers or federalism, but there may be others. That understanding is certainly right, for it is difficult to imagine Publius promoting the Constitution as a guard of the people's liberties without the securities that the separation of powers and federalism provide.[136] But it would be a mistake to confuse Publius' argument for *the* Constitution with his argument in favor of constitutionalism generally. This is to say that the Constitution of 1787 is *a* constitution and therefore must comply with the requirements of constitutionalism—founding, horizontal monism, and vertical dualism. Yet it would be fallacious to claim that every feature of the Constitution of 1787 is also an essential feature of constitutionalism. More would be needed to draw that conclusion. In fact, some features of the Constitution of 1787, though compatible with the principles of constitutionalism, remain in some tension with it, making it difficult to see how they can be essential features of constitutionalism. For example, though Publius acknowledges that the line of demarcation between state and national power is a difficult one to draw, he suggests that the more power is reserved to the states, the more it encourages their "ambition and jealousy," generating a competition that will "in all probability put a final

136. *Cf.* Fed. No. 78, p. 524 ("the complete independence of the courts of justice is peculiarly essential in a limited Constitution"); Fed. No. 17, p. 106 ("It will always be far more easy for the State governments to encroach upon the national authorities, than for the national government to encroach upon the State authorities. The proof of this proposition turns upon the greater degree of influence, which the State governments, if they administer their affairs with uprightness and prudence, will generally possess over the people").

period to the Union."[137] The device mentioned here as a safeguard against too much federalism is "*a* constitution."[138] Publius' use of the indefinite article here[139] indicates that it is constitutionalism generally that will keep state power from spiraling out of control. This is presumably because the states will be constrained by founding from using historical revisionism to amass too much power and by vertical dualism from shirking their obligations under superior law.

The second question in need of an answer is how to square Publius' constitutionalism as described in this chapter with the fact that Publius uses the term "constitution" in other ways in *The Federalist*. For example, Publius theoretically acknowledges as a constitution a regime in which "the whole power … is lodged in the hands of the people"—a structure that would fly in the face of vertical dualism and perhaps horizontal monism.[140] More specifically, he identifies as having constitutions regimes which, as we will detail in the next chapter, do not sit squarely on the constitutional tripod described in this chapter: the Achaean League,[141] Athens,[142] Great

137. Fed. No. 8, p. 49.

138. *Id.*

139. As opposed to other locutions he uses to refer to the Constitution of 1787, such as "the new Constitution," "the proposed Constitution," or even simply "the Constitution." *See, e.g.*, Fed. No. 1, p. 4; Fed. No. 8, p. 45; Fed. No. 9, p. 52; Fed. No. 15, p. 90; Fed. No. 1, p. 7; Fed. No. 15, p. 92; Fed. No. 22, p. 145; Fed. No. 10, p. 60; Fed. No. 19, p. 121.

140. Fed. No. 8, p. 46.

141. Fed. No. 18, p. 114, 117.

142. Fed. No. 38, p. 240.

Britain,[143] the German confederacy,[144] the Dutch confederacy,[145] and each of the thirteen states.[146] If these regimes do not participate in founding, horizontal monism, or vertical dualism, how can they be called constitutions? In short, Publius is not consistent as to his use of "constitution"—just as he isn't consistent in his use of "republic." As noted in Chapter 1, he appears to use "republic" in at least three ways,[147] only one of which reflects a true or genuine understanding of republicanism. So too here. Publius uses "constitution" in the same way that the European philosophic tradition uses the term: as a way to describe the arrangement of political power in a community or amongst communities. (Falling under this heading would be the references to the Achaean League, Athens, Great Britain, the German confederacy, and the Dutch confederacy.) More narrowly, it is also used to signify a uniquely American form of constitutionalism, one that the thirteen state constitutions take part in, and which is likely bound up in the idea

143. Fed. No. 41, p. 273; Fed. No. 47, p. 324; Fed. No. 58, p. 394; Fed. No. 70, p. 478 (each using "British constitution"); *see also* Fed. No. 47, p. 324-25 ("constitution of England"); Fed. No. 52, 356 ("English constitution"). Publius also uses "constitution" in numerous instances where the context makes it obvious that he is referencing the British regime. *See* Fed. No. 47, p. 326; Fed. No. 53, p. 361; Fed. No. 69, p. 467.

144. Fed. No. 19, p. 120-21.

145. Fed. No. 26, p. 126; Fed. No. 37, p. 238.

146. Publius explicitly uses "constitution" in reference to the state constitutions of all thirteen states, except Delaware. *See* Fed. No. 47 (*passim*). He also references several times in *The Federalist* the constitution of the State of New York. *See, e.g.*, Fed. No. 61, p. 411. This latter point should come as no surprise because, according to the opening number, one of the chief objectives of *The Federalist* is to explain the Constitution's "analogy to your own state constitution"—that is, to the New York constitution. Fed. No. 1, p. 7.

147. *See*, *supra* Chapter 1, note 9 and text; *see also* Peterson, *supra* Chapter 1, note 9. Generally, the first way is in line with the European philosophical tradition that understands republicanism as opposed to monarchy. The second way is in line with the general American understanding of republicanism, especially as espoused by the Anti-Federalists. The third way is the "true" definition, which is outlined in Number 39.

of separated powers and also a bill of rights. But more precisely, Publius uses "constitution" to refer to a regime that comes into effect at a certain point with specified powers, rejects exercises of power outside the legal order, and internally controls the government from above—this is the genuine understanding of constitutionalism and the one that, we will see in the next chapter, defuses the *nemo iudex* problem and makes popular government stable. With these different uses of "constitution" in mind, we can now understand why certain comments in *The Federalist* about the nature of constitutions do not jeopardize the account of constitutionalism described in this chapter. For instance, Publius states that the ability to "produce a regular and adequate supply" of money is "an indispensable ingredient in every constitution."[148] Here Publius seems to use "constitution" to refer to any general arrangement of government, not in the precise sense described above.

Third, and finally, is the question of whether Publius' theory of constitutionalism requires a *written* constitution. Publius does not say much about this question—perhaps because the state constitutions were written, the Articles of Confederation were written, the proposed Constitution was written, and as a result there was no pressing need to interrogate the importance of writing. Consequently, drawing a definitive conclusion on this issue may be difficult. But there are reasons to think that a constitution, rightly understood, need not be written. In the first place, none of the three features of constitutionalism are conceptually bound up with writing; each requires only broad-based agreement among rulers and ruled as to the origin and extent of political powers.

148. Fed. No. 38, p. 188. *See also id.*, at 189 (stating that "every well ordered constitution of civil government" will "permit[] the national government to raise its own revenues by the ordinary methods of taxation").

Second, and more affirmatively, Publius betrays a lack of confidence in writing several times throughout *The Federalist*. Most radically, he indicates that all language is subject to serious uncertainty and is thus inscrutable—a truth that would impact writing far more than it would the alternative, social custom.[149] But even if meaning could be ascertained with certainty, Publius emphasizes that "mere declarations in the written constitution[] are not sufficient to restrain" officers when they overstep "legal limits."[150] Although it is said that the pen is mightier than the sword, the "idea" of law relies on "sanction" and thus on the sword.[151] It seems more accurate to say, again, that constitutionalism relies on what the ancients called *nomos* ("custom") and what we call "norms"—well-accepted rules on which relevant actors generally agree—not necessarily written laws.

Although it is not its main task, *The Federalist* sets out and describes a theory of constitutionalism. That theory has three parts—each no more and no less instrumental than the others. Together they support the common goal of consolidating power and yoking it. In the next chapter, we will see how constitutionalism provides a republican solution to the *nemo iudex* problem.

149. Fed. No. 37, pp. 236-37.

150. Fed. No. 50, p. 343.

151. Fed. No. 15, p. 95.

CHAPTER 4: RESOLVING THE *NEMO IUDEX* PROBLEM

Now that Publius' theory of constitutionalism is in view, it remains to be seen how that theory enables an enduring form of popular rule. In Chapter 2, we found that *The Federalist* makes a sustained argument that popular rule is prone to a certain vice: the *nemo index* problem. Discouragingly, varied attempts to disarm the *nemo iudex* problem failed. In the face of this history of failures, can constitutionalism effectively solve or repress the *nemo iudex* problem? Can it transform popular government into a stable and reliable mode of government for human beings?

Before answering that question, two preliminary points must be made to the effect that Publius' understanding of constitutionalism is understood to be a novel, innovative political form. First, constitutionalism is conceptually distinguishable from those political forms that we examined in Chapter 2. If the opposite is true—if constitutionalism is coterminous any one of those forms—then there is reason to think that constitutionalism will fail the *nemo iudex* test out of the gate for the reasons stated in that chapter. And that would bring us back to the impasse at the center of this dissertation: Only a strictly republican regime is fit for the new American state, yet all the forms taken by republican rule have spelled its undoing. Second, constitutionalism's novelty means that constitutionalism has not yet arisen in the modern world. The British regime, to take one example, plainly does not meet constitutionalism's high bar. But the state governments are a closer call. After the Revolution, each state had drafted and ratified a so-called "constitution." Do these regimes meet constitutionalism's exacting standards? This section suggests they likely fail the test. Constitutionalism is therefore not only

conceptually distinct from prior methods of instituting republican rule, it is a new political mode for the modern world.

The chapter then turns to the heart of the matter: whether constitutionalism can, in fact, defuse the *nemo iudex* problem. In Chapter 3, we noted that Publius' account of constitutionalism is not essentially republican. That means a constitution, properly speaking, can obtain even where the government is not republican, either in whole or in part. But the mere possibility of a non-republican constitution says little about whether there is a positive, affirmative relationship between constitutionalism and republicanism.[1] In fact, constitutionalism is a stable form to give to a republican regime. Each prong of constitutionalism actualizes and preserves final rule by the people—the cornerstone of republicanism and popular government more generally. In particular, constitutionalism enables the people to be and remain the ultimate,[2] decisive source of

1. Here we must shift from speaking about popular government to speaking about republicanism. As a species within the genus of popular government, republicanism is susceptible to the *nemo iudex* problem. But because Publius' commitment is to republicanism specifically, rather than to popular government generally, the solution to the *nemo iudex* problem is more easily understood in the narrower republican context than in the broader context of popular government that includes direct democracy, where the *nemo iudex* problem is unavoidable.

2. This is not to say that constitutionalism guarantees that the people will remain the source of legitimate political authority. Publius does not address the dead-hand problem—which poses the question to popular governments why present-day populations must abide by the long-ago decisions of popular majorities. If this dissertation proceeded only in a historical mode, that would be a curious fact indeed. The dead-hand problem was known to the founding generation and indeed the *locus classicus* for the dead-hand problem is a letter from Thomas Jefferson to Madison shortly after ratification. *See* Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127 (1997) (quoting Letter to James Madison (Sept. 6, 1789), *in* THE PAPERS OF THOMAS JEFFERSON 392 (Julian P. Boyd ed. 1958)). But perhaps Publius' failure to address the dead-hand problem is due to its rhetorical posture: Publius' aim is to convince the people to adopt a system that can, over the long term, prevent popular rule from collapsing in upon itself due to the excesses of popular majorities and factious minorities. And, to be sure, constitutionalism as Publius understands it provides the

authority if, at the time of founding, the constitution is originally authorized according to the demands of republicanism. The higher law enacted at such a founding absorbs and retains a republican character. Accordingly, even if the government established by the constitution—that is, the entity that operates at the level of ordinary or inferior law—is not itself republican, the regime will maintain a certain republican character. In other words, because the government is authorized by the higher law, which is republican by hypothesis, the entire regime shares in the advantages of republicanism, though to a lesser extent in comparison to a strictly republican regime.

We then take up constitutionalism's solution to the *nemo iudex* riddle. How does constitutionalism prevent interested majorities, which enjoy the privilege of the "republican principle," from tainting political decisions with self-interest? Founding and horizontal monism each contribute to the solution by denying to interested majorities independent bases for asserting power. Horizontal monism asserts that majorities (factious or not) cannot claim authority outside the legal system. It thereby channels majorities through the procedural and substantive constraints of preexisting law, including higher law. Founding operates similarly, informing majorities of the genesis, and thereby the boundaries, of the legal system. But the concept that most constrains interested majorities is vertical dualism, which must be separated and evaluated according to its component types of lawmaking. The argument that ordinary lawmaking constrains such interested majorities should be familiar, as it is the subject of Number 10. But as we saw when we examined that argument in Chapter 2, Publius critically cabins

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populace of today the straightforward ability to overrule past majorities through constitutional amendments. In that regard, the dead-hand problem is not so much due to a bug within constitutionalism as the failure of the people to change higher law.

the utility of the large republic to ordinary lawmaking. Without a higher law to constrain ordinary lawmaking, the government would fall prey to the *nemo iudex* problem. What, then, prevents interested majorities from tainting the higher lawmaking process? The answer, in fine, turns on the feature that makes higher law superior to ordinary law in the republican context: that it is made through supermajorities. Higher law is not higher simply as a formality.[3] Instead, from the perspective of republicanism, higher law is superior for the reason that it is made—in the first instance as well as though the amendment process—by majorities greater than simple majorities. In turn, when a particular view commands an ever-greater majority of support, it is more and more likely to aim at the public good, not at private interest.

The chapter concludes by examining two puzzles that arise from the foregoing and help to clarify constitutionalism's solution to the *nemo iudex* problem. First, if we think that laws made by ever-larger majorities of citizens both aim at the public good and project more republican authority, why have two tracks of lawmaking at all? Why not have a single level of lawmaking, but have a rule of construction that holds that the law made by a greater majority prevails in the event that two laws conflict. But this "sliding-scale" mechanism raises several problems—including that law is never ratified by the

3. *But see* Rivka Weill, *Reconciling Parliamentary Sovereignty and Judicial Review: On the Theoretical and Historical Origin of the Israeli Legislative Override Power*, 39 HASTINGS CONST. L.Q. 457, 468 (2012) ("The Knesset did not differentiate between the enactments of regular and Basic Laws; rather, both were enacted via the same legislative process of three readings."). From Publius' point of view, the current Israeli legal crisis would be due to the fact that higher law and lower law are made through identical republican means. The difference is only formal: the Knesset simply designates some legislation as higher and other legislation as lower, hoping for the benefits of constitutionalism. But then, Publius would say, the justifications for judicial review—discussed in the next chapter—simply do not apply, leaving courts the ability to invalidate so-called higher law.

people themselves (or through a direct proxy of the people)—which vertical dualism can solve. Second and relatedly, if the promise of ever-larger majorities is to uproot interested factions in higher lawmaking, why not condition higher lawmaking on unanimity? Presumably such legislation would be beyond reproach. The problem with unanimity is that it grants a veto to tiny minorities—a problem Publius never fails to point out in the Articles of Confederation. Thus, a unanimity requirement produces the opposite of public-spirited lawmaking: minorities will obstruct lawmaking altogether. Higher law, as understood by Publius, eschews these extremes, which in turn makes strictly republican rule viable.

CONSTITUTIONALISM'S NOVELTY

The Constitution is a constitution. From Publius' vantage point, if ratified, the Constitution will be the first genuine constitution established in memory.[4] The American Revolution "has no parallel in the annals of human society" and promised new "fabrics of governments which have no model on the face of the globe."[5] The argument in favor

4. While it is possible that Publius believes the Constitution to be the first constitution established *ever*, this claim may be too strong and it would be onerous to compare constitutionalism alongside every regime known to Publius.

5. Fed. No. 14, p. 89. Admittedly, Publius states immediately after this line that the revolutionaries "formed the design of a great confederacy." But if we take this to be a reference to the Articles of Confederation, one wonders what, if anything, was novel about it. Indeed, the subsequent papers all make the general observation that the Articles of Confederation teetered on the edge of failure because it was *not* novel—it repeated the mistakes of previous confederations, each of which unraveled. Still more curious, Publius exhorts readers to "improve and perpetuate" this confederation—an odd rallying cry to apply to the Articles of Confederation given the repeated claim that the Articles will collapse under its own weakness. Toward the end of the paragraph, however, we find that "confederation" is likely not used here to refer to the Articles. Rather, it refers to the "union" itself—and whatever defects were present in the consolidation of union are merely "structur[al]." They therefore can be repaired by

of constitutionalism is an argument in favor of a novel political form—one that has not yet been tried, or at least for which its capability for actualizing the republican form of government has not been clearly established. If it succeeds, constitutionalism offers the promise of making republican rule sustainable for the first time.

Constitutionalism will not be novel if it is coterminous with any of the forms of government discussed in Chapter 2. If we cannot distinguish constitutionalism from these forms, then constitutionalism cannot promise stable republican rule—it will collapse under the *nemo iudex* problem. But constitutionalism is distinguishable. None of those forms of government by their nature require the coincidence of founding, horizontal monism, and vertical dualism. In some cases, the essential features of each form of government are antithetical to the requirements of constitutionalism.

Though a democracy—understood as a species of popular rule—should not be "confound[ed]" with a republic,[6] it is worth briefly explaining why a pure democracy sits in tension with constitutionalism. Democracy requires that the people exercise government functions—or at the very least the legislative function—"in person."[7] Yet democracy does not presuppose a founding. True, Publius avers that some of the "most pure democracies of Greece" had founders and lawgivers, such as Athens (Solon), Crete (Minos), and Sparta (Lycurgus).[8] While founding may be common among democracies, nothing about rule by the people in their direct capacity must, conceptually, arise from a

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means of a "new" structure "modelled by the act of your Convention." *Id.*

6. Fed. No. 14, p. 83.

7. Fed. No. 10, p. 61; Fed. No. 14, p. 84; Fed. No. 48, p. 333.

8. Fed. No. 63, pp. 427-28. Curiously, Carthage is also included in the list, though Dido is not typically afforded the same status of lawgiver as are Solon, Minos, and Lycurgus.

founding—a fixed event originating political power. A similar point can be made about democracy and horizontal monism: Democracy by no means implies that extra-legal assertions of the people's power are invalid. Indeed, pure democracy may not have grounds to condemn actions by a majority mob—in what sense would that mob not be able to make law when law is understood as the decision of a majority made directly by that majority? Finally, the supreme value of democracy—that the people rule directly and by simple majorities—sits uncomfortably with vertical dualism. Vertical dualism requires, at a minimum, two tracks of lawmaking. But introducing a second track of lawmaking in a pure democracy would erode the people's ability to rule by simple majority. Either the new track of lawmaking would be superior to the democratic body—thus relegating that body—or would be subsidiary to it—thereby taking day-to-day governance out of the hands of the people. For these reasons, there is considerable doubt that a pure democracy shoehorned into a constitutional form could endure for very long.

Now we turn our attention to distinguishing constitutions from the republican forms discussed in Chapter 2. First is simple representation, which takes an important step away from pure democracy in that the legislative faculty is not exercised by the people directly, but by their representatives. The legislative body is for that reason a "substitute" for the people themselves.[9] Yet simple representation and democracy suffer from the same basic problems vis-a-vis republicanism. The existence of a representative body implies only some mode of selection by the people, not a founding. Moreover, it is not clear why the decisions of representatives, who are first and foremost agents of the people, would trump extra-legal action by a majority of the people themselves (horizontal

9. Fed. No. 52, p. 355.

monism). Finally, the combination of vertical dualism with simple representation leads to a conundrum: Should the representative body retain control over higher law on behalf of the people, which would remove the representatives from day-to-day governance; or should the representative body retain control of day-to-day governance, but be subordinated to some other authority, thereby compromising whatever benefits representation provides? Either path will take the "simple" out of simple representation.

The next device we encountered was the mixed regime, which came in two varieties. The first variety was the one roughly staked out by ancient authors such as Aristotle and Polybius. But according to them, a genuine mixed regime was mixed precisely because it incorporated elements of aristocracy and monarchy. Consequently, the ancient mixed regime is not one that can be strictly republican. The second variety of mixed regime, which Publius calls "actual representation" involves allocating a predetermined number of seats in the legislature to different occupations or professions. This was thought to afford representation to each distinct interest in society, thus producing a "due sympathy" for interests that might otherwise be excluded through a general ballot.[10] But like democracy and simple representation, nothing about actual representation implies that it must take the constitutional form. Actual representation can arise outside a founding, and nothing about it condemns as illegitimate extra-legal assertions of political power. While actual representation is perhaps especially compatible with vertical dualism, a legislature composed of "actual" representatives could operate without a higher law as is the case with simple representation. Of course, actual representation does not prioritize simple rule of the majority of citizens in the way

10. Fed. No. 35, p. 218.

democracy or simple representation does. This would mean that actual representation may sit more comfortably in the constitutional form—but nothing about the doctrine requires it to take that form.

The separation of powers likewise fails the test. In Chapter 5, we will take up the question of how to enforce the constitution and will find that the answer hinges on the separation of powers. A constitution implies the separation of powers, then. But the relevant question at present is the inverse: Must a regime with the separation of powers also take the constitutional form? There is something to be said for answering in the affirmative. Publius speaks of the separation of powers as embedded in the constitutional form,[11] suggesting even that separated powers can be established only by way of a constitution.[12] And the doctrine of separated powers seems especially hospitable to constitutionalism: inchoate government power is divided at the time of the founding, it comprehends all legitimate government power, and the branches are beholden to the initial division made. But several counterexamples suggest there might be a wedge between the doctrine of separation of powers and constitutionalism. For example, the British regime plainly enjoys some modicum of separated powers despite not having a constitution properly understood. Likewise, one can imagine a regime with separated powers that developed over time but isn't traceable to a founding and for which power was parceled out among the constituent branches. On the other hand, there is a strong

11. For example, separation of powers is thought to be dependent upon keeping the distinct powers within "constitutional limits." Fed. No. 49, p. 339.

12. Publius famously argues that "parchment barriers" are incapable of keeping separate powers separate. Fed. No. 48, p. 333. That might lead us to believe that, to the extent the separation of powers relies upon constitutionalism, it might not rely on a written Constitution.

conceptual case that separated powers implies horizontal monism: if political power can validly be exercised outside the law, then could the members of a legislature, say, seek to directly punish a citizen alleged with a crime but whom the executive has refused to prosecute? Such an act would undoubtedly violate the separation of powers if done through pre-established legal channels. So there is reason to think that a system of separated powers that rejects horizontal monism may prove self-contradictory. Yet horizontal monism alone does not a constitution make. The doctrine of separated powers is agnostic as to founding and vertical dualism, and thus does not necessarily take the constitutional form.

In light of our discussion of founding in the previous chapter, it is evident that confederations also need not take the constitutional form. Recall that Publius had said the founding of a state by an "individual citizen of pre-eminent wisdom and approved integrity" is something "applicable to confederate governments also."[13] Confederacies may be established through founding, and this may be a necessary condition, for how can a confederation come to be except through some act of agreement between political entities at a fixed point in time? Notwithstanding confederations' compatibility with founding, their form is inconsistent with horizontal monism and vertical dualism. The existence of a confederacy implies the existence of constituent political communities, each of which exercises political power in their own domain. And the confederate body must recognize the legitimacy of the subsidiary state's powers that are exercised within its domain and that do not contradict the laws of the confederacy. This reality cuts against horizontal monism, for the confederate government must recognize a legitimate political

13. Fed. No. 38, p. 240.

power outside its own legal system. And it disrupts the basic scheme of vertical dualism because there is no one higher law. The laws of the subsidiary political entities do not apply to one another. And the law of the confederacy exists only by virtue of the subsidiary political entities. Accordingly, they are able to resist it or even nullify it: "[L]egislation for sovereign States … has never been found effectual."[14] The result is a "political monster" unbefitting of the name constitution.[15]

The final political device in need of assessment is the extended republic. The extended republic requires only republican institutions spread over a large geography and comprehending a reasonably large (and thus diverse) population. Although the extended republic was a novelty for Publius and his interlocutors, nothing in the concept requires the form of a constitution. An extended republic could obtain without a founding, could recognize actions like Shays' Rebellion as valid, and could take the form of, say, simple representation, which would be incompatible with vertical dualism. Though it must be doubted whether a constitution-less extended republic could long endure—needing something to hold it together over and against sectional differences—conceptually a constitution is not entailed by it.

On account of the foregoing, constitutionalism presents a novel theoretical form for the implementation of republicanism. It is neither reducible to nor implied by any of the other forms previously attempted. But this theoretical novelty leaves something to be desired. Rarely do regimes fit theoretical bright lines in practice. We therefore conclude

14. Fed. No. 16, p. 102.

15. Fed. No. 15, p. 93.

this section by evaluating two actual regimes that may rise to the level of constitutions: the British regime and the States.

The British political arrangement fails at least to incorporate founding and vertical dualism. At risk of repetition, the British cannot point to identifiable founding.[16] The Glorious Revolution is an obvious candidate for a founding. (The English Civil War is another, however the regime it established—the English Commonwealth—was terminated by the Stuart Restoration. So while it could serve as the founding for *a* state, it was not the founding for the regime extant in Publius' time.)[17] But there is considerable doubt that it meets the threshold. For one, Publius represents the ascension of William of Orange to the throne alongside Magna Carta and the Petition of Rights as one event in a string changing the relationship between monarch and subject.[18] In that struggle between ruler and ruled, the Glorious Revolution marked an occasion in which "English liberty" became "completely triumphant"[19]—but this is not to say that the English state began anew, with new powers vested in new institutions. It means only that a centuries-old regime experienced a massive shift in power from one institution to another, which significantly undercuts the claim that the British have an identifiable founding. There is a stronger claim that the British regime was horizontally monist. Wilson connects the American tradition of extra-legal direct action to, for example, the English "food riots" of

16. *See supra* Chapter 3, note 20 (describing possible foundings).

17. Another point against the English Civil War is that Publius shows some distaste for Cromwell, analogizing him to Caesar and suggests that he brought "despotism" upon England, not liberty or the constitutional form. Fed. No. 21, p. 131.

18. Fed. No. 84, p. 578 ("It has been several times truly remarked, that bills of rights are in their origin, stipulations between kings and their subjects, abridgments of prerogative in favor of privilege, reservations of rights not surrendered to the prince").

19. Fed. No. 27, p. 165-66.

1766,[20] so it is evident that such behavior was known in Britain. In response to the food riots, British officials dispersed riots and punished rioters with military force.[21] The essential point of horizontal monism is that such actions are viewed as illegitimate and are condemned by the legal system, so there is at least a colorable claim the British embraced horizontal monism. But whatever doubt there may be about these two points—founding and horizontal monism—there is little about the British regime's failure to live up to vertical dualism. Publius' entire argument for vertical dualism is couched as a criticism of the British doctrine of parliamentary sovereignty. Parliament may change "the constitution" as easily as it may change "ordinary objects of legislative provision." The constitution and ordinary statute exist on the same plane: there is "no constitution paramount to the government" and therefore no "constitutional security."[22] Setting aside the internal rules governing Parliamentary procedure—which Hart would call the rule of recognition—the British parliament is beholden to no higher law. There is no dualism to speak of in the British context.

The more difficult inquiry is whether the state governments meet the requirements of constitutionalism. Part of the difficulty is that the status of the state "constitutions"[23]

20. *See* Wilson, *supra* Chapter 3, note 50.

21. *See, e.g*, Dale Edward Williams, *Morals, Markets and the English Crowed in 1766*, 104 PAST & PRESENT 56, 68-69 (1984).

22. Fed. No. 53, p. 361.

23. These state constitutions were, by their own terms, called "constitutions." *See generally,* Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 RUTGERS L.J. 911 (1992-1993). However the precise question here is whether these documents rise to the level of a constitution, as understood by Publius. I thus use scare quotes here to remind the reader that, for Publius, whether these forms of government were indeed constitutions rests on more than what the documents purport to be.

that were put into effect during and after the Revolution is distinguishable from the states' status under the Constitution of 1787.[24] Assuming that the state "constitutions"

24. The status of the states under the new Constitution is, of course, a perennial issue for American constitutionalism (broadly understood) and a core question in interpreting *The Federalist*. The conventional view maintains that the powers wielded by the States prior to ratification survived in large part after the Constitution was put into effect. That view was, at the founding, vociferously advocated by Anti-Federalists, and survived well into the 18th century, provoking both the Nullification Crisis and the Civil War. Publius, for his part, reflects this view at times, if only by implication. For example, when discussing sovereign immunity after ratification, he remarks that the Constitution does not require the states to "surrender" their sovereign immunity, either in state or federal courts. Fed. No. 81, p. 549. This is because immunity from suit is "in the nature of sovereignty"; the states were sovereign before ratification, the thought goes, and they will be sovereign after. *Id.* at 548-49. Publius goes so far as to say that this immunity will "*remain* with the states," implying that the states' sovereign immunity was not canceled and re-conferred by the Constitution's ratification, but remained in place the entire time. *Id.* (emphasis added). But as is frequently the case in *The Federalist*, Publius' true view is complicated in several respects and often departs from the views of others at the Convention as well as the public. Martin Diamond has done the most to uncover Publius' true view. In the first place, Diamond notes that Publius did not think of "federalism" as he understood it to be a unique third form of government in between "confederal" and "national" government. Martin Diamond, The Federalist's *View of Federalism*, in AS FAR AS REPUBLICAN PRINCIPLES WILL ADMIT: ESSAYS BY MARTIN DIAMOND, 110 (William A. Schambra ed. 1992). (The first referred to an alliance of states, with each constituent state retaining total sovereignty except for the powers alienated to the confederacy; the second referred to a state for which sovereignty rested entirely with a single government, and all subsidiary entities derived their authority entirely from the sovereign government. They can roughly be though of us a bottom-up versus top-down approaches.) Instead, Diamond reads Publius has proposing a novel government in the sense that it *combines* features of both confederal and national governments. The Constitution would be "compound" in that, regarding some features of politics, it would be confederal ("federal") and in other ways it would be national (centralized). Fed. No. 23, p. 149. According to Diamond, Publius' rhetorical strategy was to convince partisans of the confederal form of government that this new compound republic would be sufficiently similar as to not warrant rejection of the Convention's plan. According to Jean Yarbrough, this view of federalism "leads to a far more consolidated national government than a majority of the framers intended in 1787." Jean Yarbrough, *Rethinking "*The Federalist*'s View of Federalism*, 15 PUBLIUS 31, 35 (1985). Because the national component of the compound will trump the state component when the two conflict, the states are "reduced to administrative agencies of the national government." *Id.* If that is indeed Publius' true view—a gripe that Yarbrough does not make of Diamond's interpretation—then it is clear that the existence of the states prior to ratification poses no issue whatsoever in analyzing whether the ratification of the Constitution marks a "founding" for purposes of

were constitutions prior to ratification, their status as constitutions may not have survived ratification. The difficulty is compounded by the fact that the vision of constitutionalism propounded by Publius certainly owes much to the state "constitutions" that developed during and after the Revolution. Publius makes frequent reference to state "constitutions," and one of the stated arguments for the Constitution of 1787 is its "analogy" to the constitution of New York.[25] Consequently, placing the state governments in the same group as non-constitutions would be a surprising result.

But, as Joyce Appleby points out, America lacked a "culture of constitutionalism" in the 1780s, even though it had a "baker's dozen" them.[26] No "special aura" had yet emerged around constitutionalism in America.[27] From this vantage point, the state "constitutions" were good first efforts at establishing the constitutional form, yet they remained too weak, failing to command adherence or loyalty. Publius' constitutionalism,

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constitutionalism, for that view maintains ultimately that sovereignty rests with the national government and only a veneer of sovereignty attaches to the states. But even if we take a view closer to the conventional one, there may not be an issue. Even if the states retain ultimate authority in their sphere, the national government may not intrude on that sphere, and the state sphere is defined largely in reference to the powers wielded by the states prior to ratification, it nevertheless may be the case that post-ratification state power derives, for purposes of constitutionalism, from ratification itself. This would mean that ratification marked a single founding, which allocated powers to states and the national government, though this allocation was influenced by what powers the states traditionally held. Publius implies as much in Number 32, where he describes the circumstances in which there will be exclusive federal jurisdiction over a matter. *See* Fed. No. 32, p. 200. The effect of this discussion is to view the Constitution as creating a *presumption* of state jurisdiction over a matter, a presumption that may be overridden in some circumstances. But that presumption requires that the Constitution, upon ratification, terminates the power of the states and, with modifications, confers it again.

25. Fed. No. 1, p. 7; Fed. No. 85, p. 587.

26. Joyce Appleby, *The American Heritage; The Heirs and Disinherited*, 74 J. AM. HIST. 798, 800 (1987).

27. *Id.*

therefore, can be thought of us as appealing to the state "constitutions" in an effort to improve upon them and firmly establish a constitutional culture around a constitutional regime. Publius calls this culture a "sacred reverence, which ought to be maintained in the breast of rulers toward the constitution of a country."[28] Without it, the entire project is liable to collapse.

True, each state "constitution" embraced vertical dualism, establishing a higher law on top and ordinary lawmaking beneath it. But matters are more complicated with regard to founding, and there is only a weak case that the states were horizontally monist. From a historical perspective, the question of founding is uncertain because the origin of the states' powers is contested and uncertain. Craig Green has recently made a persuasive case that—notwithstanding the intuitive view that the states are simply continuations of pre-Revolution colonies—the new states were established in "mutual reliance" on a new united government.[29] This raises and leaves unresolved the question of the origin of state powers: did they come from the colonial charters (and thus ultimately the Crown?), the union, the people themselves, or some combination of each? Publius is largely silent as

28. Fed. No. 25, p. 163.

29. Craig Green, *United/States: A Revolutionary History of American Statehood*, 119 MICH. L. REV. 1, 15 (2020). In making this finding, Green centers a study of new state "constitutions," noting that New Hampshire, South Carolina, and Virginia explicitly adopted new governmental forms ("constitutions") at the actual recommendation of the Continental Congress. *Id.* at 26. The ten other states did so citing congressional action as a basis for setting up a new constitution and "without considering whether any state hypothetically could have acted alone." *Id.* But, at the same time, this reliance on congressional action or recommendation leads to a paradox: Was not the Congress and Union itself somehow dependent upon the states and/or colonies? Green contends this is a kind of chicken-or-egg question, which in turn points to a theory of mutual reliance. One advantage of this theory is that it helps explain the situation of Delaware, which was a territory of Pennsylvania up until the Revolution. Delaware thus "claimed independence from William Penn and Britain at exactly the same time"—raising the question of from where the authority of the new State of Delaware arose. *Id.* at 4.

to this question.[30] We cannot explain that silence with anything more than speculation. But perhaps Publius failed to squarely address the question because his honest answer—that the states under the Constitution are in fact reliant for their corporate existence in whole or in part on the new national government—would gratuitously offend many readers and may have jeopardized the cause of ratification. As a result, there is reason to hold off on concluding that he regarded the states as *founded* political associations. It seems that post-Revolutionary states inherited their powers from different entities at different times.

The case against state "constitutions" as horizontally monist is more secure. Formally, the states each acknowledged the authority of an external body of law: that of the Confederation. This alone would be enough to confirm that they were not horizontally monist, for the acceptance of exercises of political power that are external to the political entity's legal system is the quintessential violation of horizontal monism. In addition, the states tolerated other extra-legal assertions of political power. For example, though the state governments under the Articles of Confederation were required to furnish such sums as required by Congress, Publius repeatedly laments that the states

30. Publius evidently believes that ratification of the Constitution of 1787 by the people of the several states would constitute a founding. In comparison, the ratification of state "constitutions" by, alternatively, the people of a state or their representatives could be an unambiguous founding, notwithstanding the uncertain origins of the power vested at that time. One wrinkle would be that both at the Revolution and Ratification, the common law of England survived—does this not jeopardize the claims of either the Constitution of 1787 or state "constitutions" to have a founding? Publius indicates no, acknowledging that the common law has no "constitutional sanction" but is "at any moment liable to repeal by the ordinary legislative power." Fed. No. 84, at p. 578. This appears to be the case because state "reception statutes"—duly authorized by the state "constitution"—expressly enacted the English common law subject to ordinary legislative repeal. Doctrines of common law thus were of statutory origin and fell within the grant of power made at any given founding.

shirked their obligations.[31] Failure to pay these requisitions were not meely extra-legal, they were *illegal*. Notwithstanding their illegality, the states' nullification of these obligations was, according to Publius, "constantly exercised,"[32] suggesting that such actions were perceived as legitimate or at least acquired an air of legitimacy in the minds of the public after some time. Finally, it bears mention that even if the state "constitutions" had been horizontally monist in principle, they were so ineffectually. The 1780s were replete with political crises. Publius' awareness of this fact should not be missed, for it is the central tension out which he spins the main argument of Number 10: It is the "instability, injustice, and confusion introduced [to] public councils" that marks the entry-point for to the problem of faction.[33] Although the state constitutions have made "valuable improvements" on other republican models, it would be "unwarrantable partiality[] to contend that they have as effectually obviated the danger" of faction.[34] As we said in the last chapter, the primary concern of Number 10 is to attack the operations of faction in the public councils, which is to say in the state legislatures. Yet Publius was also concerned with factions' behavior when it spilled outside the statehouse and into the streets.[35] It is hard to imagine him taking the position that the state "constitutions" condemned and deterred extra-legal assertions of political authority when they could not do the same for factions in legislatures. After all, the thrust of Publius' critique in Number 10 is that the states have become too democratic, a characteristic that surfaces both in

31. *See, e.g.*, Fed. No. 23, p. 148.
32. Fed. No. 30, p. 189.
33. Fed. No. 10, p. 56-57.
34. *Id.*
35. *See* Wilson, *supra* Chapter 3, note 50; FRANK, *supra* Chapter 3, note 58, at 140 (2013).

legislatures and via direct action. To say that the state "constitutions" have abetted the problem of faction is to say they have let the *nemo iudex* problem fester. Had the state "constitutions" been constitutions in truth—had they incorporated horizontal monism both effectually and in principle—such political crises might have been avoided.

The Constitution of 1787 would therefore be a significant step forward for popular government—it would incorporate and defend the principles of founding, horizontal monism, and vertical dualism in an effort to wall-off government from the *nemo iudex* problem. Constitutionalism's novelty may not be absolute; Publius never quite says that the Constitution will be the first constitution in the history of the world. But constitutionalism is nevertheless novel in that it is a different governmental form than the devices most commonly used to put popular rule into effect. What's more, the major precedents for popular rule—Britain, the States—all fail to rise to the level of constitutions. What remains to be shown is whether constitutionalism can indeed improve on those historical examples, making strict republicanism a credible political endeavor.

CONSTITUTIONALISM & REPUBLICANISM

We have said several times that there is no necessary conceptual association between constitutionalism and republicanism: A republican government need not take on the constitutional form. Consider a regime in which the only institution is a legislative body made up of elected members.[36] While that regime would be strictly republican, it is

36. Because such a regime has only one body, that body, which we have called the legislature, would also by necessity exercise the executive and judicial power.

not constitutional. By hypothesis, it has no higher law. And it is at best agnostic as to founding and horizontal monism; such a regime may have developed over time and could recognize extra-legal action as legitimately supplementing the acts of the legislature. The converse proposition is also true: A regime can take the constitutional form yet fail to incorporate republican elements. Consider a regime in which a hereditary king makes higher law and a council of hereditary nobles makes ordinary law, which must not conflict with the king's law. Such a regime plainly adopts vertical dualism. It also could have been founded at a fixed point in time and might maintain an ethic according to which valid exercises of political power must be traceable to an act either of the king or the nobles. This regime takes the constitutional form.[37] But because its officers—the king and the lords—do not derive their power from the people, it incorporates no republican elements. Conceptually speaking, then, there is no connection between constitutionalism and republicanism. Each can exist without the other.

37. Does such a regime avoid the *nemo iudex* problem? Perhaps, but only if the king and the governing bloc of the nobles rule in the public interest and do not heed their own private opinion or interest. This would be consistent with the doctrine presented in *The Republic* that rule by the wisest—that is, those who are able to rule in accordance with reason notwithstanding the temptations of appetite and passion—constitutes the most choice-worthy form of government. *See* PLATO, REPUBLIC, 473d (Allan Bloom tr. 1968). It is entirely possible that one could choose this particular constitutional form—a king and a council of nobles—if defeating the *nemo iudux* problem is the *summum bonum.* And notice that this regime's ability to overcome the *nemo iudex* problem has little do with its taking on the constitutional form, but it has everything to do with the particular character of the citizens who take and hold public office. For that reason, it must also be said that the regime's ability to overcome the *nemo iudex* problem is tentative. Subsequent generations of kings and nobles may be more self-regarding and therefore pursue their own interests or opinions at the expense of the public good. That is, at least in part, why Publius' highest priority is instituting a strictly republican regime, not overcoming the *nemo iudex* problem per se. The latter problem must be felt with only because popular regimes like democracy and republicanism are particularly susceptible to it.

Nevertheless, constitutionalism and republicanism are compatible. And not only are the doctrines compatible, they are particularly consonant with one another. A republican institution is deserving of the name only if it "derives all its powers" ultimately from the people.[38] Whether an institution derives its power from the people turns on first and foremost whether the people actively, consciously gave over that power. But it also turns whether there exists an ongoing, persistent "due connection" between the officers and the people.[39] Should an officer become immune from removal by the people (or their representatives), he can no longer be said to "derive" his power from the people and maintain it by a "due connection." Rather, he depends upon whoever *can* validly terminate his term of office. Strict republicanism demands that these criteria—that power be derived from the people and also be subject to the people's supervision—be present in every office in the government. Republicanism generally and strict republicanism especially accordingly take the origin and boundaries of power to be central concerns of the regime. Constitutionalism purports to offer a framework for exactly that.

First, the criterion of founding sits harmoniously with strict republicanism. From the very first essay, Publius takes the question of ratification and abstracts away from it, putting it in terms of founding: "It has been frequently remarked, that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not, of establishing good government from reflection and choice, or whether they are forever destined to

38. Fed. No. 39, p. 251.

39. Fed. No. 52, par. 357.

depend, for their political constitutions, on accident and force."[40] This celebrated remark presumes that governments can be established in the first place—that is, that they can be founded.[41] It also presumes that *good government*—whatever that might mean—can also be established. The question is whether such a government can be established only by "accident and force" or whether it is possible to do so by way of "reflection and choice." The former option does not appear on its face to relate to popular government because it would include a wise ruler that imposes his wisdom on the political community. The establishment of that kind of government may require force. It also may depend upon an accident: that the wise is in a position to rule in the first place. But a good government established by way of "reflection and choice" does depend upon a notion of popular government. That is why deciding the "important question" has been "reserved to the *people* of this country." If a "choice" is made by someone other than the people at large, then that choice will have to be effectuated through force because it will need to be

40. Fed. No. 1, p. 3.

41. The claim that "establishing" and "founding" are synonymous here is open to the objection that the former may be construed more broadly than the latter. We described "founding" in the prior chapter as an event that conveys power to a new government and decisively puts an end to all political authority that may have been exercised prior to the founding event. Such authority may be re-conveyed by the founding, but it need not be so. Thus powers that are as it were carried over to the post-founding regime cannot claim legitimacy on the basis of tradition or continuity. Those powers' legitimacy turns only on the founding event itself. In contrast, the "establishment" of a government may not imply such circumstances: a new government may be established but carry over preexisting powers. But this may be a distinction without a difference in the context where the institution of a new government is being done by the people and with the aim of the new government being strictly republican. That is because, at the time of instituting, the people would have the formal and actual authority to terminate preexisting powers. To the extent that preexisting powers survive the "establishment" of the new government, it is only because the people allow it to be so. There is not much daylight between that possibility and the view of founding just described.

imposed upon the people. That may result in good government. But Publius is articulating a vision where good government need not depend on accidents.

Just as the concept of a popular founding begins *The Federalist*, so too it ends it: "The establishment of a constitution, in time of profound peace, by the voluntary consent of a whole people, is a PRODIGY, to the completion of which I look forward with trembling anxiety."[42] The concept is a refrain throughout the work. It is "one united people" that "fighting side by side throughout a long and bloody war, have nobly established their general Liberty and Independence."[43]

A popular founding is not without challenges, however. Founding concerns the ultimate origin of authorized political power. But the people are biased toward what is close to them and treat what is distant with suspicion: "It is a known fact in human nature that its affections are commonly weak in proportion to the distance or diffusiveness of the object."[44] In turn, the people may exhibit jealousy at the time of a republican founding. They might choose to grant power to institutions closer to them—such as the states in the case of the Articles of Confederation—rather than vest institutions farther from view.[45]

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42. Fed No. 85, p. 594. Publius also immediately draws attention to the alternative: "new attempts" by "POWERFUL INDIVIDUALS" to obstruct the creation of a national government, presumably to reserve power to themselves. *Id.* at 595. That such future events would consist in "attempts" and that the individuals would take authority from the people might indicate that those events should be considered accident and force.

43. Fed. No. 2, p. 9. Yet it is worth noting that the establishment of a government by reflection and choice became possible only after the exercise of "force" in the Revolution. That raises the question, which goes unanswered, whether accident and force must always precede the establishment of a regime through reflection and choice.

44. Fed. No. 17, p. 107.

45. Fed. No. 15, p. 93 (vesting the states with too much authority has left the national government "destitute of energy"). But there is also the problem that the Articles were not privileged to have had a republican founding. Rather, the national government under that document was authorized by the states acting in their corporate capacity. *See*

The people may also vest an institution with power but, fearful of the consequences, may also fetter it procedurally. That is what the Constitution of 1787 aimed to do regarding standing armies.[46] Or the people may place substantive constraints on the exercise of power, such as by limiting the subject matter on which the government may act[47] or by recognizing substantive rights against the government.[48] A popular founding—unlike, say, the founding of a monarchy—involves the giving over of power rather than the taking of it. Republican power therefore runs the risk that the people, who are acting both in the capacity of ruler and ruled, put too little faith in government.

One more thing must be said about popular foundings: They are popular not because they are effected directly by the people en masse, but because the people have authorized them. "It is not a little remarkable," Publius says, "that in every case reported by antient history, in which government has been established with deliberation and consent, the task of framing it has not been committed to an assembly of men; but has been performed by some *individual citizen* of pre-eminent wisdom and approved

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Fed. No. 22, p. 146 (discussing the "fabric of American Empire").

46. Fed. No. 24, p. 153 ("[T]hat clause … forbids the appropriation of money for the support of an army for any longer period than two years: a precaution, which, upon nearer view of it, will appear to be a great and real security against the keeping up of troops without evident necessity.").

47. *See* U.S. CONST. art. I, § 8.

48. To be sure, Publius famously rejects the need for a Bill of Rights. Fed. No. 84. But even in that number he acknowledges that the Constitution contains some substantive protections for the people, such as the definition of treason, the ability to petition for a writ of habeas corpus, and the prohibition on titles of nobility. Fed. No. 84, pp. 576-77; *see also* Ralph A. Rossum, The Federalist*'s Understanding of the Constitution as a Bill of Rights*, in SAVING THE REVOLUTION: THE FEDERALIST PAPERS AND THE AMERICAN FOUNDING (Charles R. Kesler ed.) 219 (1987).

integrity."[49] We have already remarked on the relation between "deliberation and consent" here and "reflection and choice" in Number 1. It is astonishing that a popular founding could be effectuated through the icon of a single "individual" founder in the first place. And not only that, but the examples from "ancient history" were confined to such circumstances; that is, ancient republics could *only* be established by a single founder. Later, Publius explains that for "all great changes of established governments," it is "essential, that such changes be instituted by some *informal and unauthorised propositions*, made by some patriotic and respectable citizen *or number of citizens*."[50] Reading these passages alongside one another indicates that modern politics has, for an unstated reason, opened up the possibility that "the task of framing" now can be "committed to an assembly of men"[51] as opposed to just one. Whether the establishment of the government is first proposed by a single founder or an assembly of "patriotic and respectable" citizens, the critical point is that such citizens merely *propose* a form of government. That proposition carries no legal force or authority on its own. It is the people who ratify—which is to say, establish—the government and vest it with authority. That leads to the substantial result that popular foundings are always republican in a sense: Because the people ratify the form of government only *after* a preeminent citizen or self-appointed delegation of preeminent citizens propose it, a popular founding does not proceed directly from the people. Popular foundings are thus never democratic in the strict sense; even when the resultant government is democratic (as opposed to

49. Fed. No. 38, p. 239-240 (emphasis added).
50. Fed. No. 40, p. 265 (emphasis added).
51. Fed. No. 38, p. 239-240.

republican), all founded popular governments will have made use of the tools of republicanism.[52]

Second, strict republicanism sits in tension with extra-legal assertions of political authority and so is reinforced by horizontal monism. Recall from Chapter 1 that Publius had defined republicanism in the language of appointment and removal: "[W]e may define a republic to be … a government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period or during good behavior."[53] An institution is republican only if its powers are "administered"—that is, exercised—by officers that are appointed and removable by the people generally speaking. A regime that is strictly republican would only have institutions that fall within this definition. Thus, the demand of strict republicanism recognizes only three types of legitimate political exercise: the appointment of officers by the people, the removal of officers by the people, and the administration of the government by officers so appointed and so removable.

That exclusivity points toward horizontal monism. The paradigmatic violation of horizontal monism is the mob. But mobs are anathema to strict republicanism because—to the extent we can even call such groups "institutions"—they are non-republican.[54]

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52. But they may result in democracies. That is because the form of government proposed by the founder or the cadre of elites may in fact be a democracy.

53. Fed. No. 39, p. 251.

54. *See* Abraham Lincoln, "The Perpetuation of Our Political Institutions (Address by Abraham Lincoln before the Young Men's Lyceum of Springfield, January 27, 1838)," 6 JOURNAL OF THE ABRAHAM LINCOLN ASSOCIATION, 6 (1984), available at https://quod.lib.umich.edu/j/jala/2629860.0006.103/--perpetuation-of-our-political-institutions-address?rgn=main;view=fulltext ("[B]y the operation of this mobocratic spirit, which all must admit, is now abroad in the land, the strongest bulwark of any Government, and particularly of those constituted like ours, may effectually be broken

They violate the republican maxim that "the whole power of the proposed governing is to be in the hands of the *representatives* of the people," a maxim which is "the essential … [and] only efficacious security of the rights and privileges of the people which is attainable in a civil society."[55] Assuming there is no law authorizing the actions of the mob,[56] the mob's actions cannot be called "administration" because its members have no claim to being representatives. Further, we cannot say that the members of the mob are officers; they have not been appointed by the people at large, but by themselves. And we must resist the conclusion that the mob is the great body of the people itself, and for two reasons. The posse is presumably a band of citizens not more than a few thousand, and thus numerically insufficient to constitute the "great body" of the people. And even supposing the posse did constitute the "great body" of the people, it is not acting in one of the two ways the people are meant to act in a republic: to appoint officers or to remove them.

Disputes and disagreements are meant to be resolved through either legal processes or political processes. That is why Publius rejects the option of confederation:

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down and destroyed—I mean the *attachment* of the People.").

55. Fed. No. 28, p. 178.

56. Of course, in Publius' view the law may authorize calling forth the posse comitatus to a lawful end: "It would be absurd to doubt that a right to pass all laws *necessary* and *proper* to execute its declared powers would include that of requiring the assistance of citizens to the officers who may be entrusted with the execution of those laws; as it would be to believe that a right to enact laws necessary and proper for the imposition of collection of taxes would involve that of varying the rules of descent and alienation of landed property or of abolishing the trial by jury in cases relating to it. It being therefore evident that the supposition of a want of power to require the aid of the POSSE COMITATUS is entirely destitute of color, it will follow that the conclusion which has been drawn from it, in its application to the authority of the federal government over the militia is as unhanded as it is illogical." Fed. No. 29, pp.182-83.

when the constituent members come apart, they can be brought back together only "by substituting *violence* in the place of *law*, or the destructive *coertion* of the *sword*, in place of the mild and salutary *coertion* of the *magistracy*."[57] The coercion of the magistracy includes not only enforcement in accordance with law (legal process), but the replacement of magistrates in accordance with the will of the people (political process). And yet, even in strict republics and non-confederacies, insurrections will arise.[58] Publius acknowledges that "the idea of governing at all times by the simple force of law … has no place" under such circumstances.[59]

The government must resort to violence on occasion to suppress extra-legal assertions of political power. And for that reason, it is no accident that the institution empowered to put down insurrections is the Constitution's most republican institution: Congress.[60] True, Publius acknowledges one practical reason why it should be Congress and not the states: raw power. "A turbulent faction in a State may easily suppose itself able to contend with the friends to the government in that State; but it can hardly be so infatuated as to imagine itself a match for the combined efforts of the Union."[61] Consequently, the "dread of punishment" will provide a "strong discouragement" from

57. Fed. No. 21, p. 129.

58. The problem with confederacies appears in this light not to be that they pose insurrections at all. That is because "emergencies of this sort will sometimes arise in all societies, however constituted." Fed. No. 28, p. 176. The problem with confederacies is that the constituent members—because they control the confederate body—may take the side of insurrectionists and obstruct the forces hoping to put it down.

59. *Id.*

60. *See* U.S. CONST. art I., § 8, cl. 15 ("To provide for calling forth the Militia to … suppress Insurrections."); *see also id.* at art. IV, § 4.

61. Fed. No. 27, p. 173.

rebellion.[62] But there is also a reason in principle. Because Congress is the best stand-in for the will of the people, it is the entity most capable of judging when "unceasing agitations" amount to a genuine revolution in the name of the people.[63] That can be achieved only when "the whole power of the proposed government is to be in the hands of the representatives of the people," for this is "the only efficacious security for the rights and privileges of the people."[64] Congress can determine when the ordinary process of law (that is, the coercion of the magistracy) should not apply, because genuine insurrection usurps the power of the people and, by that fact, the position of Congress. In putting down rebellion, Congress thus "maintain[s] the just authority of the laws."[65]

Third, vertical dualism provides a unique mechanism for entrenching rule by the people through their representatives. Vertical dualism mandates two tracks of lawmaking, a higher and a lower. At a minimum, the process for legislating on the inferior track is authorized and explained by the higher law. Inferior law is thus given real effect by virtue of its relation to higher law.

Notwithstanding inferior law's dependency on higher law, republicanism must be established on each track independently. That is to say that a regime may incorporate vertical dualism but be only partly republican. Consider a regime in which the people ratify a constitution proposed by some esteemed members of the community. That constitution would be republican. But if the terms of the constitution provide for an institution populated only be hereditary nobles, and those nobles must give their assent

62. *Id.*
63. Fed No. 28, p. 177.
64. Fed. No. 28, p. 178.
65. Fed. No. 28, p. 178.

before a new proposal becomes law, then the inferior-level law would not be itself republican. And the reverse can be said: perhaps the constitution was set up through accident and force at the behest of some powerful individuals, such as a hereditary aristocracy. But the terms of the constitution those nobles ratified provides for a republican process for lower-track lawmaking. That regime, too, would incorporate vertical dualism. But the higher law would not be, in isolation, republican. That vertical dualism supports republicanism can be seen in both cases: it allows a regime to operate in a republican fashion at one level, but not another. And it is especially true in the former case—where it is the constitution that is republican—because the fact that the higher law is republican flows through to lower law. On those facts, lower law is authorized by a republican higher law and thus enjoys in the benefits of higher law's republican character, at least to some extent.

But when both tracks of lawmaking are intended to be republican, the two tracks of lawmaking reinforce one another in that character. The clearest way this arises is when three conditions are met: (1) the higher law is in the first instance created according to the requirements of republicanism; (2) the lower law is made by institutions that are also republican; and (3) the procedure for amending the higher law relies on those very same institutions, making the amendment procedure also republican. Under these circumstances, a republican higher law reinforces a republican lower law because it both authorizes the republican lower law and it provides an additional republican foundation for the lower law. And the reverse proposition may also be said. Although the republican higher law is not dependent upon lower law at the time of its initial creation, and subsequent developments in the higher law are—by the amendment procedure staked out—derivative of republican institutions.

This state of affairs arises under the Constitution of 1787. First, ratification of the Constitution was in the first place conditioned on the consent of nine state conventions.[66] That the representatives in each convention obtained their office through popular measures is sufficient to secure the Constitution's initial ratification as republican.[67] Second, the lower laws authorized by the Constitution are each produced by republican institutions.[68] Although the Guarantee Clause permits states to "substitute other republican forms" at will, that turns on the condition that "they shall not exchange republican for anti-republican Constitutions."[69] That clause secures the republican character of the states, meaning state law must be fundamentally republican.[70] This result has consequences for the other kind of "lower law" within the American constitutional

66. U.S. CONST. art. VII.

67. *See* Fed. No. 39, p. 254 ("[T]he Constitution is to be founded on the assent and ratification of the people of America, given by deputies elected for the special purpose."); AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY, 7 (2005).

68. The Constitution of 1787 creates a "compound" republic. It erects a federal government and several state governments, each dividing authority—sometimes clearly, sometimes not. But that fact is not a threat to the claim that the Constitution embraces vertical dualism. It simply means that there are *several* types of inferior law within the American constitutional system. Of course, there need be rules for when those various inferior laws come into conflict. And the Constitution contains some such rules. For example, when a federal law and a state law conflict, the federal law prevails. U.S. CONST. art. VI, cl. 2 (Supremacy Clause). That's the easy case. When state laws conflict, the resolution often comes down to a first-in-time rule. *See, e.g.*, *id.* art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."). That the Constitution presents rules for determining which inferior law prevails indicates that—though there may be many "inferior" laws—those inferior laws are meant to be in practice reconcilable.

69. Fed. No. 43, p. 292; *see also* Fed. No. 21, p. 131 ("It could be no impediment to reforms of the State Constitutions by a majority of the people in a legal and peaceable mode.").

70. *See also* Fed. No. 28, p. 176 (putting down insurrections to preserve state republicanism)

system: federal law. Several types of federal officers are chosen directly or indirectly by state legislatures: senators,[71] the president,[72] all federal judges,[73] and to a great extent principal officers of the executive branch.[74] Members of the House of Representatives are directly elected by the people, but they too are downstream of state legislatures. Although they are elected directly by the voters in their districts, the House districts themselves are determined by state legislatures and the Constitutions vests those legislatures with the authority to determine qualifications for voting.[75] That means, as we observed in Chapter 1, the republican character of the federal government turns in great part on the republican character of the state governments. All told, this means that the two kinds of inferior law within our system—state law and federal law—are decidedly republican. Third, the amendment process for the federal constitution rides on these republican institutions. Article V sets out a decidedly republican two-step amendment process. In the first step, amendments may be proposed either by a two-thirds vote of both the House of Representatives and the Senate, or by a convention called after "the Application of the

71. U.S. CONST. art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof.").

72. *Id.* art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors."); *id.* amend. XII ("The Electors shall meet in their respective states and vote by ballot for President and Vice-President.").

73. *Id.* art. II, § 2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint … Judges of he supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for.").

74. *Id.* ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint … other public Ministers and Consuls.").

75. *Id.* art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several Sates, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.").

Legislatures of two thirds of the several States."[76] That is: at the first step, proposed amendments are set in motion either by the republican federal Congress or by the republican state legislatures. The second step—ratification—may be satisfied by approval of three-fourths of the state legislatures or three-fourths of state conventions. This is all to say: further developments of the republican higher law are channeled through the republican institutions that ordinarily make inferior law, thus ensuring that the higher law remains republican.

Accordingly, although constitutionalism and republicanism are not coeval, nor must they occur alongside one another, constitutionalism serves an actualizing function for republicanism. Republicanism aims to establish and entrench rule by the people through representation. That goal necessarily supposes a limitation: political power cannot be legitimately wielded unless it is actually and apparently wielded on behalf of the people. Because constitutionalism's three elements regard the source and ongoing application of political power, it provides a particularly strong frame through which strict republicanism can pursue its goals.

CONSTITUTIONALISM & THE *NEMO IUDEX* PROBLEM

We are told that the "aim of every political Constitution is or ought to be first to obtain for rulers, men who possess most wisdom to discern, and most virtue to pursue the common good of the society."[77] Only when those individuals have been selected must

76. *Id.* art. V.

77. Fed No. 57, p. 384. This remark reveals that for Publius constitutionalism is instrumental; it is not an end in itself. Republican rule is an end in itself, for it is the actualization of mankind's proud determination to self-rule. Constitutionalism serves the end of republicanism, but is not coterminous with it. For an alternative account of

the political constitution "take the most effectual precessions for keeping them virtuous whilst they continue to hold their public trust."[78] Needless to say, an official who uses his office to pursue his own interest or affirm his own passions has no "virtue" with which to "pursue[] the common good." The first aim of constitutionalism, therefore, should be to avoid electing officers who from their lack of virtue fall prey to the *nemo iudex* problem. And if such men are able to find their way into office, constitutionalism must shackle them. The thesis of this dissertation is that constitutionalism provides a mechanism for exactly that. So, armed with the tools of constitutionalism, how can strict republicanism beat back the *nemo iudex* problem and stabilize republican rule?

We should recall that the solution to *nemo iudex* provided in Numbers 9 and 10 does not provide a complete answer. According to those numbers, faction will be suppressed in America because it will "take in a greater variety of parties and interests" and thereby "make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens."[79] But that is a non-response to our question for two reasons. First and most decisively, the argument in Number 10 assumes a premise that constitutionalism does not: a variety of interests and a large number of citizens.

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constitutionalism which serves as an end in itself, *see* Alon Harel, *Why Constitutionalism Matters: The Case for Robust Constitutionalism*, 1 CRITICAL ANALYSIS L. 32 (2014). Harel explains that his account of "robust" constitutionalism diverges from traditional accounts (of which Publius' would be one) holding that constitutionalism and judicial review are good based on contingent benefits they provide to institutional decisions. To Harel, however, constitutionalism and judicial review are good because they "transform and restructure relations between the state and its citizens." *Id.* at 33. For example, constitutionalism emphasizes that certain legislative decisions are "not discretionary," but are "owed as a matter of duty to citizens." *Id.*

78. *Id.*

79. Fed. No. 10, p. 64.

Without that assumption—to which, of course, Publius is entitled given his and America's particular historical circumstances—the argument falls apart. The claim is directed decidedly *against* small republics with few citizens.[80] On the other hand, constitutionalism does not presuppose a large or populous society. So if constitutionalism provides an answer to the *nemo iudex* problem, it must be distinct from the one offered in Numbers 9 and 10. Second, Publius provides the caveat in Number 37 that a "variety of interests" has a "contrary influence … in the task of forming" the society.[81] So the enlarged sphere argument applies only to ordinary politics. That means the argument of Numbers 9 and 10 cannot speak to founding moments or moments that Ackerman otherwise might call "constitutional moments."

As we have observed, founding points to a *source* of political authority. Founding wipes the slate clean and provides a new surface on which to craft law and order. For that reason, all exercises of political power must trace their authority, in one way or another, to the genesis of the particular regime's political authority: its founding. Horizontal monism works similarly. It asserts that majorities—factions or otherwise—cannot claim the mantle of legitimate political authority outside the legal system. It thus serves a channeling function, forcing a bloc of citizens hoping to assert their will to do so through procedural and substantive hurdles. Assertions of political will thus must be traced to the controlling legal system.

The traceability requirements established by founding and horizontal monism erect a boundary around the exercise of political power. For example, a person who

80. Fed. No. 9, p. 52-56.

81. Fed. No. 37, p. 238.

wishes to command the military must occupy the office of president and achieve that office through legal means (horizontal monism). In turn, he must ordinarily obtain a majority vote in the electoral college.[82] If he does so, he has a claim to exercise the commander-in-chief power. Yet that claim only makes sense if the commander-in-chief power and the office of the president derive from the body of people who effected the Revolution and afterward established a system of government (founding). By contrast, a person who receives no votes in the electoral college—or a person who receives some votes, but not a majority—lacks a claim whatsoever to exercise the commander-in-chief power.

To be sure, the nature of law permits countless questions on which reasonable minds disagree: "[I]t cannot be pretended that the principles of moral and political knowledge have in general the same degree of certainty with those of the mathematics."[83] But the indeterminacy of certain clauses and propositions does not cut against the importance of the principle of traceability. Rather, it reinforces it. Scholars are sharply divided on countless questions of American and foreign constitutional law. That a consensus may never be reached on these questions is beside the point, for everyone agrees that their position is correct because it is the one authorized by the legal system resulting from a single founding. Even so-called living constitutionalists, who argue that constitutional meaning can and must change over time in response to changing political, legal, and cultural standards, cannot reject the authority and legitimacy of the constitution or the founding on which it rests. That is to say, whether a position prevails

82. U.S. CONST. amend. XII.

83. Fed. No. 31, p. 195.

ultimately turns on whether it is genuinely traceable to the legal system produced by the founding. Traceability is about *legal* argument, not moral or philosophical argument.

This traceability requirement cuts against the *nemo iudex* problem in two ways. First, it constrains political actors in the positions that they take as well as the bases on which they seek to justify those positions. An act carrying political authority cannot be justified on policy grounds alone because such an act requires a link to the original grant of political authority at the founding.[84] For example, even if a hereditary aristocracy could be justified on policy grounds, no one in the American system can claim a title of nobility and thus that others owe him obeisance.[85] While a policy argument of course must also be made, it is the policy argument—rather than the legal argument—that gives cover to faction's aim of making political decisions that further its members' interest or gratify their passions. Traceability thus substantively constrains which "common impulse[s] of passion, or of interest, adverse to the rights of other citizens," would otherwise be carried into effect.[86]

Second, frequent appeals to a single, well-established legal system that is linked to a single grant of political authority will modify the passions of the people. Human beings are "very much … creature[s] of habit."[87] Because political authority must be linked to the legal system and founding, such appeals will become habitual. These arguments will "touch the most sensible chords and put in motion the most active springs of the human

84. *Cf.* Fed. No. 32, p. 202 (explaining that the new federal government's power to tax turns upon "questions of prudence" as well as "power").

85. U.S. CONST. art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States"); *id.* art. I, §10, cl. 1 ("No state shall … grant any Title of Nobility").

86. Fed No. 10, p. 57.

87. Fed. No. 27, p. 173.

heart," thereby developing "respect and attachment" to the authority established at the founding.[88] That is to say the passions of the people may drift away from those passions that are "adverse to the rights of other citizens" and towards those that serve "the permanent and aggregate interests of the community"—the common good.[89]

The failure of the states to requisition taxes under the Articles of Confederation illustrates both problems nicely.[90] The Articles provided for an "unlimited power of providing for the pecuniary wants of the Union" and requests for funds, within certain limits, were "in every constitutional sense obligatory upon the States."[91] Publius specifies that the states had "no right to question the propriety of the demand" and "no discretion beyond that of devising ways and means of furnishing the sums demanded."[92] In other words, the states had no legal basis to ignore the requisitions that the Congress under the Articles had issued. But "in practice" the right to question tax requisitions was "constantly exercised." The states thus made two interrelated moves in rejecting tax demands. First, they denied that the legal framework imposed by the Articles was in this respect binding on them, which is a violation of the principle of horizontal monism. Second, they located a "right" of their own, derived from their own authority and as sovereign states and continuations of British colonies, which is a violation of the founding principle of the confederacy, according to which they had no such right. And refusing to

88. *Id.*

89. Fed. No. 10, p. 57.

90. *Cf.* Fed. No. 22, p. 138 ("The system of quotas and requisitions, whether it be applied to men or money, is in every view a system of imbecility in the union, and of inequality and injustice among the members.").

91. Fed. No. 30, p. 189.

92. *Id.*

satisfy the requisition is a classic *nemo iudex* problem: refusal is cheaper, and Congress lacked the power to force the states to pay.

From this angle, horizontal monism and founding act in conjunction: each denies an interested faction an independent basis for asserting political power. Founding denies the claim that a power was vested at time immemorial and thus remains vested *now*. Horizontal monism denies the claim that there are extra-legal bases for legitimacy. In tandem, these concepts point to a *single founding* that generated a *single political system* within which all legitimate political power must operate.

Notwithstanding the benefits provided by founding and horizontal monism, vertical dualism is the keystone of constitutionalism and secures its ability to repress the *nemo iudex* problem. Perhaps that is because vertical dualism operates as a critical link between founding and horizontal monism. Higher law comes into effect early in time—presumably at or around the time of the founding—and derives its authority in proximity to the founding. The establishment of higher law thus marks the completion of a transition. Whereas the founding authorizes and confers political authority, higher law instantiates that authority in the form of law.[93] In contrast, inferior law relates to horizontal monism because it delineates the procedure through which a bare majority carries out its political will. Horizontal monism shunts political majorities into the legal

93. Even so, it is not necessarily the case that the substance of the higher law is related to the founding moment. That is because the higher law can be amended, and amendments may reflect political beliefs or standards quite different from those held at the founding. Yet this consideration is not enough to sever the connection between higher law and founding. That is because amendments change the status of the law only prospectively; it remains the case that the unamended higher law took its original form at or around the time of the founding. And the amendments—in one way or another—all turn on that original higher law.

system. And more often than not, these majorities are *bare* majorities, meaning the only legal system through which it can wield authority is the inferior lawmaking system. Such majorities cannot assert political power by way of higher law, because slim majorities are incapable of consolidating sufficient votes to speak in the name of the people and make higher law. Because vertical dualism serves as a bridge connecting founding and horizontal monism, constitutionalism's defense against the *nemo iudex* problem appears when we independently analyze each track of lawmaking: higher law and inferior law.

We begin with inferior lawmaking. When a strictly republican regime is couched in constitutional form, inferior lawmaking is critically bounded on two ends. Because the law must be republican, it cannot be made by minorities. That would contradict "the fundamental maxim of republican government, which requires that the sense of the majority should prevail."[94] Accordingly, a majority—however slim—is required to make inferior law. On the other hand, inferior law is not made by large supermajorities; as discussed in more detail below, higher law is the domain of supermajorities.

94. Fed. No. 22, p. 139. While this proposition is unobjectionable, especially to modern ears, it is far from obvious. And Publius does not elaborate why the republican principle requires that the majority's viewpoint—or "sense"—ought to dominate. The answer appears only if we assume the opposite: that a minority could make law in a republic. In that hypothetical, the question arises as to the basis upon which a minority of, say, forty-nine percent of the population claim political authority over an opposing minority also constituting forty-nine percent of the population. (Assume for sake of the hypothetical that the remaining two percent of the population prefers a third and incompatible course of action, and that that two percent is unwilling to compromise.) Neither group is greater than the other, so numbers provide no justification for prevailing. One group thus succeeds at the other's expense only if its votes—for whatever reason—count more. That possibility offends the republican principle because it relies on the possibility that citizens are not equal in political authority. Indeed, that is a premise of aristocracy and monarchy, not republicanism. Thus, republicanism's majoritarian principle grows out of the fact that any other principle results in a self-contradiction.

Constitutionalism accordingly represses the *nemo iudex* problem in the process of inferior lawmaking by denying self-interested or passionately opinionated minorities the prerogative to rule. Such minorities simply cannot prevail in inferior lawmaking on account of the republican principle.

But what about self-interested or passionately opinionated majorities? Here, we must distinguish between large and small republics. That is because *The Federalist*'s primary purpose is to defend the Constitution's fitness for the Americans. Because America is a large republic, Public's primary concern is with large republics. But Publius' constitutionalism does not show an affinity for large republics as such. As we discussed in the prior section, constitutionalism and republicanism buttress one another, and that result applies to large and small republics alike.[95] As such, if constitutionalism has a credible claim to diffusing the *nemo iudex* problem in republics, its claim must address both large and small republics. The answer as to large republics is well known, having been stated straightforwardly in Number 10, recapitulated in Number 51, and repeated throughout the scholarly literature. When we "[e]xtend the sphere, and … take in a greater variety of parties and interests," we "make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be much more difficult for all who feel it to discover their own strength, and to act in unison with each other."[96] Accordingly, in a vast republic like the United States—with its "great variety of interests"—"a coalition of a majority of the

95. *Cf.* Robert J. Morgan, *Madison's Theory of Representation in the Tenth Federalist*, 36 J. POL. 852, 853 (1974) ("Madison intended to demonstrate that the durability of the American republic would depend *primarily* on a constitutional superstructure of representation flexible enough to control the struggle of opposing interests.").

96. Fed. No. 10, p. 64.

whole society could seldom take place on any other principles than those of justice and the general good."[97] Small republics do not enjoy this advantage, however, so how does constitutionalism help them? According to Publius, in two ways. First, Number 10 does not deny that majorities in small republics might make law on principles of justice and the public good, thereby rejecting passion and interest and respecting the rights of minorities. He simply contends that it is less likely to happen. That is no small matter theoretically, because it contradicted Montesquieu, or practically, because even one decision by a factious majority could spell disaster. But it is to say that Publius does not deny that majorities in republics *tend* not to fall into the *nemo iudex* trap and that small majorities enjoy that benefit. Second, small republics that take on the constitutional form will have legislatures that are substantively constrained by higher law. Presuming that the interested or passionate majority in the small republic is not utterly lawless, it will be forced to make law within the constraints of higher law. Of course, the substance of each constitution will vary, so we cannot speak with much specificity. Through higher law, constitutionalism sets substantive limits on the powers of factious majorities, thereby limiting those majorities' capacity for abuse.

97. Fed. No. 51, p. 353.

Constitutionalism's solution to the problem of corruption[98] is not dissimilar. That is, when it comes time to *execute* ordinary law after it has been duly legislated,[99] it is possible that the officers charged with execution do so in a way that violates the *nemo iudex* principle. If a constitution be established in a large republic, the citizens elected to office are more likely to be responsible and aim at the public good when executing the law. And if it be established in a small republic, the officers, though likely less fit, are bound by the substance of higher law.[100]

Now we turn to higher lawmaking proper. As just explained, higher law's superiority is not a mere formality. Rather, higher law is superior because it is based on more substantial authority than ordinary law.[101] In a republic, that means higher law is

98. Publius' concern with corruption is less pronounced than his concern with judging in one's own cause while legislating. But it remains a concern because self-concerned officers always pose a threat. Indeed, those officers almost disrupted the Revolution: "[M]any of the Officers of Government … obeyed the dictates of personal interest … or whose ambition aimed at objects which did not correspond with the public good, were indefatigable in their endeavours to persuade the people to reject the advice of that Patriotic Congress." Fed. No. 2, p. 11; *see also id.* ("The Revolution was furthered along only because "the people reasoned and decided judiciously." *Id.*

99. We should be careful at this juncture not to assume too much about the separation of powers. In the next chapter, we will briefly cover the argument that constitutionalism implies a tripartite separation of powers. But at this stage, all we are entitled to assume is that republics—like all societies with a rule of law principle—must both make law and apply law. That is why Publius avers at least twice that even in "pure" democracies, the people legislate directly, but leave the execution of the law to their magistrates. *See* Fed. No. 48, p. 333 (describing democracies as a government in which "a multitude of people exercise in person the legislative functions" while also speaking of the people's "executive magistrates"); Fed. No. 63, p. 427 ("In the most pure democracies of Greece, many of the executive functions were performed not by the people themselves, but by officers elected by the people, and representing the people in their executive capacity.").

100. The bare majority principle stated above in relation to inferior law making may not often apply to the corruption problem. That is because executive officers might have a authority to act alone and so may not be bound by a majority requirement.

101. In a non-republican regime or partly republican regime, by definition either the

higher because it is made in a *more republican fashion*. It has a higher claim to being made by "the people" or by the people's representatives. And inferior law carries republican force because it is made by a majority of the people or their representatives—never by a minority—so higher law's claim to superiority must be founded on its enactment by a *super*majority. This principle applies both when higher law is initially put in place as well as when it is the product of amendment.

That means when a view commands an ever-greater majority of support, it is more likely to aim at the public good. Any coalition that embraces a "great variety of interests, parties and sects" can "seldom take place on any other principles than those of justice and the general good."[102] That is the argument for the extended republic, but the

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higher law or the inferior law will be made on a basis other than the people or their representatives. One of the two will command more authority because its basis for authority will be considered by the citizens of the community more commanding. Consider a constitution in which the king makes higher law and the people's representatives make inferior law. The king's right to make higher law could rest on several bases depending upon the political context. For example, if the king claims divine right and that view is embraced by many members of the political community, higher law would command more authority because it is authored by an instrument of divine will. Alternatively, the political community might think that a republican council ought not make higher law because "[o]ne of the weak sides of republics … is that they afford too easy an inlet to foreign corruption." Fed. No. 22, p. 142. But a hereditary monarch, though "often disposed to sacrifice his subjects to his ambition," is nevertheless "not easy for a foreign power to give him an equivalent for what he would sacrifice by treachery to the state." *Id.* Monarchs, in other words, are not easily bought off, and so permitting one to make higher law may insulate the regime from foreign meddling with lower lawmaking. Thus the constitutional regime will have put security from foreign interference as a greater value than lawmaking by the people—a form of security over liberty.

102. Fed. No. 51, p. 351. Unfortunately, Publius says little else to justify this important premise. The thought simply appears to be that, where a decision rests on widespread agreement, the decision is not likely to offend common interest but is instead likely to support the common good. There are obvious objections to Publius' line of reasoning: (1) large majorities might oppress or otherwise impose costs on small and politically weak minorities, and (2) the line of reasoning suggests more that decisions will be made in good faith rather than that the decisions will bring about good results. It is likely that

principles also applies to supermajorities. The common thread is that when a group that serves as the authority of government legislation is sufficiently numerous *in absolute terms*, it is unlikely that a legislative determination emanating from that group will violate the *nemo iudex* principle. In the large republic, the voting base is sufficiently large that a bare majority will meet the minimum threshold in absolute terms. And even in some small republics, presumably a carefully drawn supermajority requirement might meet the same threshold in absolute terms. American constitutionalism thus takes a double benefit from this principle: because America is large, it can avoid the *nemo iudex* problem during ordinary law making because even bare majorities will embrace a sufficient diversity of views; and the benefits are all the greater when the people meet the supermajority requirement to make higher law.

Now we come full circle. Vertical dualism assumes that the higher law both authorizes and constrains inferior law. An inferior law that contradicts the higher law is—within the constitutional system—no law at all. And the same may be said for officers who seek to enforce inferior law. Thus, when the higher law is enacted by the people and their representatives by supermajority, we can feel confident that it was not put into place for factious reasons that may undermine the stability of the republic; because the operations of inferior law are bound by those substantive constraints, inferior law also enjoys in some insulation from the most dangerous consequences of the *nemo iudex*

Publius would agree with each of these objections in some measure. His response would probably be that, though they are valid political concerns, they are endemic problems to republicanism: minorities will lose routinely and suffer costs and prejudices they likely should not; and good choices often can only be known in retrospect. The task at hand, then, is to make those outcomes less likely, which can only be done if decisions are made in good faith and by larger majorities.

problem. Consider Publius' statement that any "limited constitution" necessarily "contains certain specified exceptions to the legislative authority; such for instance as that it shall pass no bills attainder, no *ex post facto* laws, and the like."[103] Such laws are "contrary to the first principles of the social compact, and to every principle of sound legislation."[104] Accordingly, they are the sort of limits that ought to be embedded into higher law and thus become entrenched in the political order: the substance of a ban on bills of attainder targets inferior lawmaking; no inferior law may be a bill of attainder. Accordingly, higher law substantively constrains the legislation and execution of inferior law. It forces the public good into all the operations of ordinary law, crowding out the places where the disease of the *nemo iudex* problem can fester.

TWO PUZZLES

We conclude the chapter by discussing two puzzles that emerge from constitutionalism's solution to the *nemo iudex* problem.

First, it might be wondered whether the conceptual relationship between supermajorities and simple majorities requires not two tracks of lawmaking, but many—indeed, nearly as many tracks as there are degrees of supermajorities. That is, if a supermajority derives its advantage over a simple majority because a broader base of republican support confers more political authority on the law, that might suggest a rule of construction whereby a law enacted by a slightly greater majority controls a law

103. Fed. No. 78, p. 524.

104. Fed. No. 44, p. 301.

enacted by a slightly lesser majority. (Hereinafter, I will call this the "sliding-scale" theory of republican authority.)

Consider a legislative counsel with fifty members.[105] Inferior law requires a vote of twenty-six. But a law enacted by such a bare majority may be thought to yield to a law enacted by twenty-seven members. In turn, a law enacted by twenty-seven members would be controlled by a law enacted by twenty-eight, and so on.[106] In such a legislative body, there would not be two tracks of lawmaking, but twenty-five. And of those twenty-five, twenty-four would be—in some sense—"higher law" because there is some other level of lawmaking that it can trump.

Such a system comports with the notion that the larger a group of citizens is, the more republican authority it wields. But it takes little imagination to see the kinds of havoc the sliding-scale mechanism would produce. For starters, it would be difficult to administer effectively. Even in a small republic, "the Representatives must be raised to a certain number, in order to guard against the cabals of a few."[107] The size of representative bodies in a republic is no minor matter, making up the principal subject of a bloc of four

105. And, for sake of simplicity, no quorum requirement for voting.

106. Again, for sake of simplicity, I set aside the case where a law seeks to repeal or otherwise control an earlier-enacted law and both are enacted by equal majorities. That case could be decided in accordance with the traditional rule that the later-in-time prevails. See Fed. No. 78, p. 526 ("The rule which has obtained in the courts for determining their relative validity is that the last in order of time shall be preferred to the first. But this is mere rule of construction, not derived from any positive law, but from the nature and reason of the thing."). True as that may be, we might also think that a law seeking to repeal or limit another law should require *more* authority, and a law enacted by the same degree of majority fails to satisfy that condition. Such an understanding of republican authority might be more palatable where the difference between the repeal and no repeal is a single vote—if the later-in-time law cannot satisfy that criterion, perhaps it is best to leave the state of the law unchanged.

107. Fed. No. 10, p. 63.

papers, Numbers 55 through 58. But if there is an absolute minimum number for a representative body to function, then there would be perhaps many dozen levels of higher lawmaking. With so many possibilities, representatives may have no idea what effect a bill will have before it ultimately passes; that is because they not only lack clairvoyance to know *whether* the bill will pass at all, but by what *degree* it will pass. In the worst case scenario, a bill might aim to repeal or constrain two earlier enacted laws, but the bill passes by a supermajority sufficient to repeal only one. Validly enacted laws thus might have effects opposite to the intent of the representatives, thus frustrating the entire point of republicanism. How can the people rule when their representatives cannot ascertain—in even a minimal way—the consequences of newly proposed laws?

The sliding-scale theory also leads to the peculiar result that banal laws enacted by unanimous vote or voice vote—for example, where to locate a post office—carry the most republican force and thus constitute high*est* law. That cuts against the whole point of constitutionalism, which is to decide "matter[s] of the utmost moment to [the people's] welfare" and insulate them from the *nemo iudex* problem.[108] Bur ordinary and routine matters like where to put a post office do not often implicate matters of "utmost importance" nor do they raise grave concerns about judging in one's own cause.[109] It would therefore be odd to afford such decisions the designation of constitutional lodestar.

108. Fed. No. 1, p. 6.

109. *But see* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 349 ff. (2021) (discussing the Post Roads Debate); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1506 ff. (2021) (same).

Finally, this sliding-scale theory of legal superiority would seem to violate one of the core principles of constitutional republicanism: that the higher law be made *by the people* and not just their representatives. "It has not a little contributed to the infirmities of the existing fœderal system," Publius explains, "that it never had a ratification by the PEOPLE."[110] The Articles of Confederation rested on "no better foundation than the consent of the several legislatures," leaving the Congress's pronouncements subject to uncertainty.[111] While the people need not ratify *directly*, they cannot effect a ratification by means of their ordinary representatives in the legislative councils. But the sliding-scale theory supposes that it is possible to refer to the same legislative body in order to distinguish between the sizes of supermajorities and thus the degree of republican authority.

Vertical dualism prevents each of these problems. When the public enacts a higher law, it does so through a peculiar process and *on the understanding that* it is crafting a higher law that will constrain ordinary law. The people and their representatives thus know what they are promulgating and—with reasonable certainty—what its effects will be. The only question is whether it passes or not. And because the threshold for passage is a well-established vote of a supermajority, the public will pursue new provisions of higher law only when they truly concern matters of exceptional importance.

The second puzzle is why not to require unanimity for enactments of higher law.[112] If the more a republican majority embraces an ever-wider diversity of views means the

110. Fed. No. 22, p. 145.

111. *Id.* Presumably the uncertainty arises from the purported doctrine of nullification. Publius continues that "[o]wing its ratification the law of a State, it has been contended that the same authority might repeal the law by which it was ratified." *Id.* at 145-46.

112. This puzzle is different from the one posed by the sliding-scale theory because it

majority is more likely to produce laws aiming at the public good, then presumably laws that are enacted unanimously are most likely to aim at the public good. The best security, then, for higher laws that are not compromised by the *nemo iudex* problem would seem to be a unanimity requirement.

Publius' rejection of a unanimity requirement is unqualified.[113] For him, requiring unanimity results in a one-person veto, which exacerbates the *nemo iudex* problem rather than solves it. The problem with a unanimity requirement is that each voter has the power to affirmatively make policy with motive and opportunity to self-deal; it is that he can place a negative on any proposed policy, thereby obstructing necessary lawmaking and engineering a political geography that serves his own partiality. A single voter's veto will make the most difference when all of his fellow voters favor the same proposed legislation. Ironically, it is precisely under such circumstances that Publius would be confident that the proposed legislation serves the public good—indeed he might be practically certain, because the legislation enjoys the support of virtually every voter. So—far from ensuring that only the most public-spirited propositions become higher law—the unanimity requirement is likely to undermine that very goal.

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presupposes that there are only two-tracks of lawmaking, not various degrees of superiority.

113. The grounds on which Publius rejects a unanimity requirement would echo later in Lincoln's First Inaugural: "Plainly the central idea of secession is the essence of anarchy. A majority held in restraint by constitutional checks and limitations, and always changing easily with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people. Whoever rejects it does of necessity fly to anarchy or despotism. Unanimity is impossible. The rule of a minority, as a permanent arrangement, is wholly inadmissible; so that, rejecting the majority principle, anarchy or despotism in some form is all that is left." *See* First Inaugural Address of Abraham Lincoln, March 4, 1861, available at https://avalon.law.yale.edu/19th_century/lincoln1.asp.

Publius' rejection of unanimity comes in a slightly different context: his discussion of the "right of equal suffrage among the States" under the Articles of Confederation. That rule, which he calls an "exceptionable part" of the Articles,[114] violates every "idea of proportion, and every rule of fair representation" native to republicanism.[115] That is because the equal-suffrage rule violates the "fundamental maxim of republican government" that "the sense of the majority should prevail."[116] Accordingly, a "majority of States" might be a "*small* minority the people of America" and yet make the law in any event, thus contradicting "the plain suggestions of justice and common sense."[117] A republic cannot last long under such circumstances because the disempowered majority will not "acquiesce in such a privation of their due importance in the political scale."[118] The discussion is not yet on all-fours with our question about a unanimity requirement. But we are beginning to see the problem with placing too much power in the hands of a minority in the republican context.

Publius next turns to supermajorities of states, noting that under the Articles "the most important resolutions" require a vote of "not seven but nine States."[119] This does not cure the problem, and for two reasons. The first—and most straightforward—is that a supermajority-of-states requirement does not ensure a majority of citizens: We can

114. Fed. No. 22, p. 138. That is, the equal-suffrage rule is a rule to which we should take *exception*; it is not "exceptional" in the sense that it is praiseworthy.

115. *Id.*

116. *Id.* at 139.

117. *Id.* (emphasis added).

118. *Id.*

119. *Id.* at 139-140.

enumerate nine states that "contain less than a majority of the people."[120] But the more important problem is that though a supermajority-of-states requirement might "at first sight … seem a remedy, is in reality a poison," for it "give[s] a minority a negative upon the majority."[121] (Note: this problem is said to arise wherever "more than a majority is requisite to a decision," and so must be dealt with in any constitutional republic, not simply one that gives equal suffrage to subsidiary entities, like states.) In the Polish Diet, for example, Publius points out that a "single veto has been sufficient to put a stop to all their movements," presumably because unanimity was required.[122] In Publius' words, such unanimity requirements are thought to "contribute to security," yet their "real operation is to embarrass the administration, to destroy the energy of government, and to substitute the pleasure, caprice or artifices of an insignificant, turbulent or corrupt junto, to the regular deliberation and decisions of a respectable majority."[123] Accordingly this is one subject matter in which "practice has an effect, [which is] the reverse of what is expected from it in theory."[124] And while the Articles of Confederation does not have a unanimity requirement, it suffers from the same basic problem of a minority veto: "A sixtieth part of the Union, which is about the proportion of Delaware and Rhode-Island, has several times been able to oppose an intire bar to its operations."[125]

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120. *Id.* at 140.

121. *Id.* at 140.

122. *Id.*

123. *Id.* at 140.

124. *Id.*

125. *Id.* In this light, supermajority requirements and unanimity requirements share the same problem—they only differ in degree. The relevant difference is only the size of the minority needed to obstruct the necessary operations of government. By way of example, consider two voting pools, each with a hundred voters. One has a unanimity

Although these minorities cannot affirmatively make law in a way that violates the *nemo iudex* rule, they are nevertheless existentially dangerous. Publius highlights political "emergencies," in which "the goodness or badness, the weakness or strength of [the nation's] government, is of greatest importance, [and] there is commonly a necessity for action."[126] In such emergencies, inaction is not feasible: "The public business must in some way or other go forward."[127] Understanding that political paralysis spells doom for the body politics, the majority will "conform to the views of the minority."[128] That not only violates basic principles of republicanism, it sets a "tone" to the proceedings, produces "continual negotiation and intrigue" and results in "contemptible compromises of the public good."[129] That is another way of describing the *nemo iudex* problem and is precisely what constitutionalism is designed to avoid. But it could be worse: Sometimes, "things will not admit of accommodation" and the minority will cause the majority's proposed course of action to be "injuriously suspended or fatally defeated."[130] Supermajoritarianism becomes a suicide pact, keeping the government in a "state of inaction," "savour[ing] of weakness," and "border[ing] upon anarchy."[131]

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requirement to make higher law, and the other requires ninety votes. In the first case, each voter will have a veto. In the second case, a faction of ten voters must agree to obstruct higher legislation. It will therefore be more difficult (though not particularly difficult) to prevent higher legislation in service of the public good in the second case. A unanimity requirement is thus more objectionable because it provides a veto to the smallest number—a single voter—and indeed to *every* voter.

126. *Id.* at 140-41.

127. *Id.* at 141.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

Publius reiterates the basic problem in an (albeit brief) discussion of the quorum requirement for the houses of Congress, which stipulates that a "Majority each [House shall constitute a Quorum to do Business."[132] Some object that "more than a majority ought to have been required for a quorum" as an "additional shield to some particular interests, and another obstacle generally to hasty and partial measures."[133] Publius admits that the security arising from supermajority requirements "cannot be denied."[134] But he responds that there are many cases in which "justice or the general good … require new laws to be passed, or active measures to be pursued."[135] A supermajority requirement—even for a *quorum*, not as a voting threshold—would "reverse[]" the "fundamental principle of free government" because "the power would be transferred to the minority."[136] A minority, simply by not showing up to the public councils, could "screen themselves from equitable sacrifices to the general weal" or "extort unreasonable indulgences" from the public.[137]

One could come away from these passages in Numbers 22 and 58 with the impression that Publius is an opponent of supermajority and unanimity requirements across the board. But that cannot be the case for several reasons. Not only does the

132. U.S. CONST. art. I, § 5.

133. Fed. No. 58, 396-97.

134. *Id.* at 396.

135. *Id.* at 397.

136. *Id.*

137. *Id.* Publius adds here that a supermajority requirement for a quorum would also "facilitate and foster the baneful practice of secessions," although he does not explain how. The question becomes more perplexing given that he simultaneously observes that the practice of secession "has shewn itself even in states where a majority only is required."

Constitution of 1787 itself implement several supermajority rules,[138] but supermajorities are implicit in the idea of a constitution that arises in a republic. That is because, as we said, constitutionalism requires vertical dualism, and higher law is higher because it bears greater republican authority. Supermajority requirements are most dangerous when they apply in emergencies and matters of existential import. But the proper subject of higher law is quite the opposite. It regards fundamental considerations and protections of the commons. Those may be existential, but they are not always urgent. Hence Publius expresses no difficulty in saying that ratification "must result from the *unanimous* assent of the several States that are party to it."[139] Not only does each state's people not need to assent unanimously, but a state becomes party to the compact only by its own agreement. Rhode Island, in other words, cannot obstruct ratification in the other states.

We are now prepared to give meaning to the puzzle that Publius poses in Number 37. There, as a reminder, he points out that the proposed Constitution of 1787 may not have struck the correct balance between national and state power because "[o]ther combinations, resulting from a difference of local position and policy, must have created additional difficulties."[140] He acknowledges that, as argued in Number 10, this "variety of interests" will have a "salutary influence on the administration of Government when formed."[141] The problem is that the massive diversity of viewpoints in America has a

138. *See, e.g.* U.S. CONST. art V (amendment procedures); *id.* art. II, § 2, cl. 2 (procedure for making treaties).

139. Fed. No. 39, p. 254.

140. Fed. No. 37, p. 237.

141. *Id.* at 238.

"contrary influence … in the tasking of forming it"—that is, of forming the government.[142] The puzzle is that Publius states no reason for this limitation on the argument of Number 10, or explicating why the "contrary influence" is felt.

In ordinary legislation the representative lawmakers are giving voice to the will of the people. Because they represent—in aggregate—large territories full of diverse interests, a bare majority of those representatives is not likely to make law based on self-interest, passionate opinion, or ill-well to minority groups. But in higher lawmaking—the task of forming a government—the representatives play a *predictive* function. They are not giving expression to the will of the people, but are rather anticipating it. "The express authority of the people alone could give due validity to the Constitution."[143] And in light of the particular proclivities of minority groups, who might withhold their assent for peculiar or outlandish reasons, the representatives face a difficult task. Minority hold-outs can obstruct amendments or even fail to join the union in the first place,[144] and that is a result of ratification and amendment rules that explicitly incorporate supermajority requirements or operate in similar ways. Representatives proposing higher laws are not likely to propose laws that are self-serving or partisan. Doing so would not be likely to meet any relatively high supermajority requirement. The diversity of interests places extreme pressure on the higher lawmaking process. It is not "salutary" because higher laws that likely ought to be made will be obstructed by small but sizable minorities. That is the meaning of the remark in Number 37.

142. *Id.*

143. Fed. No. 43, p. 296.

144. *See* Fed. No. 39, p. 254.

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Publius' constitutionalism, like all efforts in limited government, aims to eliminate or control abuses of power. Through founding, horizontal monism, and vertical dualism, constitutionalism aims to provide reference points for the source, boundaries, and operation of political authority. And in so doing it constrains to a large extent partisans from acting in their self-interest or based on passionate opinion in such a way that it jeopardizes the stability of the republic. The lynchpin of the mechanism is vertical dualism, which itself turns on supermajoritarianism.

But as we have seen supermajoritarianism is not a straightforward enterprise. Vertical dualism cannot exist in the republican context without a supermajority requirement. But mere supermajoritarianism will not cut it. Crafting the wrong supermajority requirement will not repress but entrench the *nemo iudex* problem. Publius does not support anything like the sliding-scale theory of legislation or a unanimity requirement for higher law, with the result that higher law must be distinguished by *some* supermajority threshold. Where, then, to draw the line when it comes to a vote to make higher law? Publius does not say, meaning that the project of constitutionalism—not unlike the project of a large republic—is an "experiment," a philanthropic endeavor to determine if better political forms can be devised.[145]

145. Fed. No. 14, p. 88.

CHAPTER 5: ENFORCEMENT & LIMITS

We have established Publius' theory of constitutionalism to the extent that we have described a constitution's features and the mechanism by which one represses the *nemo iudex* problem. Supposing that a constitution can be established in a republic in the first place, it stabilizes and edifies republican politics. But one last challenge remains: In order to provide for a republic that can long endure, the constitution itself must be enforceable, and its enforceability must be durable. So—how can or must a constitution be enforced?

This question is one of practice, not theory. That makes sense, for by Publius' lights "a government ill executed, whatever it may be in theory, must be in practice a bad government."[1] It is "experience" that "justifies theory"[2]—not the other way around—and experience teaches that the devices we explored in Chapter 2 cannot alone sustain republican rule. The confederacy of republics, for example, is a "solecism in theory," which is to say that it is a mere confusion of ideas.[3] But "in practice" such confederacies are "subversive of the order and ends of civil policy," as Publius explains in several papers about historical confederacies.[4] The practical problem with those confederacies is that the constituent members of the confederacy, acting as sovereigns, judge in their own cause at the expense of the whole. Accordingly, the confederate body must "substitut[e]

1. Fed. No. 70, p. 472.

2. Fed. No. 76, p. 514.

3. Fed. No. 20, p. 129; *see also* Fed. No. 15, p. 93 (calling a confederacy of republics a "political monster of an *imperium in imperio*.").

4. Fed. No. 20, p. 129.

violence in place of *law*" in order to maintain the confederacy.[5] The practical problem endemic to a confederacy is one of enforcement: the law of the confederacy cannot be enforced, meaning if the confederacy is to be preserved in the face of the *nemo iudex* problem, then it must be by means of civil war.

Although according to Publius the constitution is a novel political form, that does not mean experience has nothing to teach about how the constitution can or should be enforced. In the republican context, enforcement divides roughly speaking into two different possibilities, which this chapter takes up in turn. Experience guides us away from the first and toward the second.

First, because by hypothesis the constitution will obtain in a strictly republican regime, the possibility arises that the constitution can be enforced by the people—the "only legitimate fountain of power" from whom "the constitutional charter … is derived."[6] There is much to commend the possibility that the people can effectively enforce the Constitution. Because the people have made the higher law, they are ultimately responsible for it. Who better than the people to enforce the constitution, then? Publius seems to embrace this view at several places in *The Federalist*, leading readers to think that indeed the people should or must play an important role in deciding constitutional questions. Yet Publius decidedly backs away from that position in Numbers 49 and 50, where he rejects the propositions that the people should decide disputes between the branches of government on either an occasional (Number 49) or periodic (Number 50) basis. So what is Publius' final view? It is possible to harmonize

5. *Id.*

6. Fed. No. 49, p. 339.

these various passages by saying that Publius' rejection of popular enforcement is confined only to the separation of powers context; for all other constitutional questions, Publius might be a supporter of enforcement by the people. I reject that view and argue instead that each of the passages in which Publius appears to endorse popular enforcement of the constitution in truth regards something like the people's prerogative to revolt. For Publius, the discussion of popular enforcement in Numbers 49 and 50 is his baseline position for ordinary political times, and it is there that he says popular enforcement of the constitution is likely to succumb to the *nemo iudex* problem.

Second, if the people cannot be relied upon to enforce the constitution even in a strict republic, then the task must fall to the republic's officers. This section explains why enforcement by officers requires, according to Publius, an independent judiciary and judicial review. Prior to the Constitution of 1787, separation of powers largely considered legal determinations to be the province of the executive, and so did not separate adjudication from enforcement. Publius criticizes such divisions—as in the case of the Articles of Confederation—because they leave out an *impartial* arbiter for legal questions. But that problem would double in a constitutional system, because vertical dualism demands the enforcement not just of ordinary law, but of higher law. Accordingly, a constitution cannot survive without enforcement by its officers, and that in turn requires the creation of an independent judiciary with the power to declare certain laws and government actions repugnant to the higher law.

Finally, we conclude by discussing three *limitations* on constitutionalism that arise in *The Federalist*. First, constitutions are susceptible to manipulation during the course of higher lawmaking, as Publius observes in Number 37. While we explained in the last chapter that these concerns are unlikely to prove the undoing of constitutionalism

because higher law requires a supermajority to be created, sometimes ill-considered or even evil substantive rules will work their way into higher law. Second, the substance of a provision might be so indeterminate that placing it into higher law works against the purposes of constitutionalism. Such indeterminate provisions can arise for several reasons. But in any event, Publius counsels against including such vague language in higher law because doing so jeopardizes the very purpose of constitutionalism: to constrain lower law and ordinary officials under the yoke of the people's will, so long as the people have acted by lawful means. Third, and as is suggested by the previous section on judges, if the enforcement of the constitution turns on judicial review, then might not judges judge in their own cause? If so, that would take us all the way back to the original use of the *nemo iudex* principle: parties to a litigation deciding the outcome of that litigation. Publius provides no decisive response, which tells us that at the heart of the matter constitutionalism can never fully eliminate the *nemo iudex* problem; rather it represses the problem sufficiently that it does not pose an existential threat. And so Publius' response to this limitation is to explain that judges will be constrained, for example, through their passivity. But they will also be constrained through their selection process: judges should be selected based not only on their character, but on their education. Astonishingly, education arises in *The Federalist* only as to the selection of judges;[7] if the "right" persons are selected for that critical office, they might voluntarily limit their own power for the sake of the republic.

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7. Publius does refer to members of the "learned professions" in Number 35. Presumably a person's membership in such a profession has something to do with his education. Nevertheless, Publius does not discuss in any detail the education culmination in professional membership—his account is not as rich as Tocqueville's for instance.

ENFORCEMENT BY THE PEOPLE

When a person or body bound by the constitution violates it, who should decide the question and impose the sanction? At several points in *The Federalist*, Publius indicates that the people are competent to perform that rule, that "frequent reference of constitutional questions, to the decision of the whole society" ought to be made.[8] For example, he explains that if "the Fœderal Government should overpass the just bounds of its authority"—which is laid out in the constitution—then "the people whose creature it is must appeal to the standard they have formed, and take such measures to redress the injury done to the constitution, as the exigency may suggest and prudence justify."[9] To be sure, Publius does not think that leaving the decision up to the people should be the initial step in dealing with real or imaginary constitutional violations. That is because the "national government, like every other, must judge in the first instance of the proper exercise of its powers."[10]

Publius does not appear to have in mind in this passage that the people ought to merely exercise their sovereign prerogatives through pre-established channels, such as through voting. That is, one might have thought that the remedy for passing such an

8. Fed. No. 49, p. 340.

9. Fed. No. 33, p. 206. Several scholars have noted that Publius fails to mention judicial review in this passage. That is, that he skips immediately from officers judging the extent of their own powers under the constitution to enforcement by the people. *See* Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1, 28 (2011); Leonard W. Levy, *Judicial Review, History and Democracy: An Introduction*, in JUDICIAL REVIEW AND THE SUPREME COURT 6 (L. Levy ed. 1967). But if, as I argue below, this passage along with Number 16 do not regard enforcing the constitution under ordinary circumstances but rather something like an emergency, then the people must act under the right to revolution, not their rights under the constitution. Accordingly, it would be unusual for Publius to raise judicial review here.

10. *Id.*

unconstitutional law is simply to "restrain" the offending lawmakers through "frequent elections" by electing new representatives.[11] That cannot be the correct reading, and for two reasons. Publius explains that when the people enforce the constitution under such circumstances, they must "take measures to redress" the violation, and those measures must conform to the nature of the "exigency" and may be justified by "prudence."[12] But electing other officers, who presumably disagree with the unconstitutional provision or action, does not lend itself to the kind of popular discretion Publius references here. That is, if the remedy lies in an election, then the people lack flexibility in remedying the violation, which is precisely what Publius suggests in this passage. Moreover, electing new officers—who will presumably repeal or undo the action alleged to violate the constitution—would fail to sanction the action *as unconstitutional*. The action would be undone as a matter of political will, not as a matter of enforcing higher law. Yet in this passage we see Publius' concern only with the latter.

Publius provides an instructive example of popular enforcement. Suppose the national government "should attempt to vary the law of descent in any State"—that is, the laws of inheritance, which are typically thought to be matters for the state governments.[13] Publius acknowledges that Congress could pass such a law only on an understanding of its powers arising from "forced constructions" of the constitutional text.[14] Even so, he says, "would it not be evident that in make such an attempt [Congress]

11. Fed. No. 57, p. 386.
12. Fed. No. 33, p. 206
13. *Id.*
14. *Id.*

has exceeded its jurisdiction and infringed upon that of the State?"[15] Such a result "cannot easily be imagined."[16] And for that reason, were no intermediate officials to stop the operation of a national law acting upon inheritances, the people would be forced to obstruct the law in whatever way is appropriate under the circumstances.

In Number 16, Publius addresses a question about popular enforcement that goes ignored in Number 33: enforcement by the states. His view is that states are largely unable to enforce the constitution. The states can play a role in keeping the federal government within constitutional bounds only in very narrow circumstances: when "the interposition of the State-Legislatures be necessary to give effect to a measure of the Union."[17] In such circumstances, the state cannot be said to truly "enforce" the constitution because the state need only engage in "NON-COMPLIANCE" in order to ensure the federal "measure is defeated."[18] But that is not enforcement; it is obstruction.

And outside these narrow circumstances, the states have no substantial role in enforcing the constitution:

> [I]f [the execution of the laws of the national government] were to pass into immediate operation upon the citizens themselves, the particular governments [of the States] could not interrupt their progress without an open and violent exertion of an unconstitutional power. No omissions, nor evasions would answer the end. The[] [States] would be obliged to act, and in such a manner, as shall leave no doubt that they had encroached on the national rights. An experiment of this nature would always be hazardous—

15. *Id.*

16. *Id.*

17. Fed. No. 16, p. 103. Although Publius' remark narrows the circumstances to when "State-Legislatures" are required for the enforcement of federal law, the logic his position would apply when *any* state officials or bodies are required to act before the federal law can be operationalized.

18. *Id.*

> in the face of a constitution in any degree competent to its own defense, and of a people enlightened enough to distinguish between a legal exercise and an illegal usurpation of authority.[19]

When the operation of national law does not depend upon the states, then the states are bound by the law just like any other party. "Non-compliance" provides no recourse because the force and effect of the national law does not require state compliance in the first place. And more stringent opposition—which Publius earlier calls "ACTIVE RESISTANCE"—must be rejected. For one, active resistance is "unconstitutional" and thus violative of the law.[20] But the doctrine, which later came under the name nullification, would vitiate the constitutional framework and reduce it to a confederate framework. In a confederacy, as we saw, the only way for the confederate government to enforce the law is by force, not through peaceable means. The doctrine of nullification repeats that error, but makes the constituent members (i.e., the states) the belligerent party. It would return the constitutional framework to the confederate framework, and that has proven unsafe for republicanism because the only way to enforce confederate (or in our case, national) law is through force, which by hypothesis the states will oppose with force.[21] That is civil war, which the Constitution of 1787 and indeed all constitutions are meant to prevent.

19. *Id.* at 103-04.

20. *Id.*

21. Just as Publius fails in Number 33 to address the possibility that the people would vote for new representatives as a means of correcting a constitutional violation, he fails to raise here the possibility that the states could elect new senators to correct for violations.

Because the states can play no substantial role in enforcing the constitution (at least against the national government),[22] the task falls to the people. "[A]s the natural guardians of the constitution," the people can "throw their weight into the national scale, and give it a decided preponderancy in the contest."[23] That is to say: The people are capable of deciding the meaning of a constitutional provision and adjudicating the dispute between different officials or governments; in the case addressed here, because the states have "encroached on national rights" by undertaking an "open and violent exertion of an unconstitutional power," the people will put their weight behind the national government.[24]

22. Publius couches this conversation in terms of the states opposing unconstitutional actions by the national or federal government. That should be unsurprising given that the polemical nature of *The Federalist* aims to refute the criticisms of the Anti-Federalists. *See* David J. Siemers, *Publius and the Anti-Federalists: "A Satisfactory Answer to all the Objections"?*, in THE CAMBRIDGE COMPANION TO THE FEDERALIST (Jack N. Rakove & Colleen A. Sheehan eds. 2020) (discussing reasons why Publius' engagement with the Anti-Federalists jeopardized the integrity of his political theory). And as partisans of the states, the Anti-Federalists generally thought that threats to liberty (and thus of the law broadly speaking) would originate with the national government. For them, the states were the protectors and guardians of law and thus of private liberty. So it makes sense that the possibility Publius addresses here regards an unconstitutional act by the national government rather than some other entity. But there is no reason to confine the possibility of constitutional violations to those by the federal government, and Publius' logic is not to the contrary. Federal law is binding on all parties—states as well as individuals—under the Supremacy Clause, at least to the extent that federal law does not violate the Constitution. Something similar can be said for state law: it is binding on all parties to the extent it does not violate the constitution and is not overridden or preempted by federal law. Accordingly, in the reverse case of the one that Publius addresses in Number 16—that is, when a state violates the constitution—it might always be said that federal *non*-action is prerequisite before the law may be carried out. The federal government can always override the state law by way of affirmative action. This would not be "ACTIVE RESISTANCE" as when the shoe is on the other foot, but is simply the national government exercising its prerogatives under the Constitution.

23. *Id.* at 104.

24. *Id.*

Notwithstanding Publius' apparent endorsement of enforcement by the people in these essays, it would be surprising if they represented Publius' final or decisive word on the matter of constitutional enforcement by the people. After all, it would be odd for him to say that the constitution can be enforced by the people when it is the people who have the prerogative to amend the constitution, however onerous that process may be. Why should the people choose to enforce something (by deciding constitutional meaning) rather than amend the constitution? To return to Publius' example in Number 33, if it is so clear that the federal government cannot pass legislation regarding the laws of succession, but it does so anyway and the states cannot obstruct the law, should the people not simply pass a constitutional amendment declaring their understanding of the law? Moreover, the purpose of constitutionalism is to avoid the *nemo iudex* problem—to avoid judging under conditions where passion and interest must prevail. Publius does not explain in much detail in Numbers 16 and 33 how the people might enforce the constitution, but the possibility proves potentially embarrassing in light of the public's proclivity to be worked "into the wildest excesses."[25]

Publius arrives at that critique in Numbers 49 and 50. Having just concluded in Number 48 that parchment barriers are insufficient to prevent the accumulation of power,[26] he proceeds in these numbers to reject the possibility that the people can decide such constitutional questions. As he explains in Number 50, the inquiry is whether the

25. Fed. No. 37, p. 175.

26. Fed. No. 48, p. 338 ("[A] mere demarkation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.").

people have "aptitude for *enforcing* the Constitution," not whether the people have capacity for "*altering* the Constitution itself."[27]

Number 49 regards a proposal described in Jefferson's Notes on the State of Virginia which would provide a periodic appeal to the body politic when separation-of-powers disputes arise. According to the proposal: "[W]henever two of the three branches of government shall concur in opinion, each by the voices of two thirds of their number, that a convention is necessary for altering the constitution or *correcting breaches of it*, a convention shall be called for that purpose."[28] Publius praises the proposal as "strictly consonant with republican theory."[29] But in doing so, he reframes the proposal as an "appeal to the people."[30] Perhaps that is an unfair characterization of the proposal, because it suggests that the people will decide the question directly whereas the proposal states plainly that a dispute among the branches will be resolved by *convention*, that is by a stand-in for the people. Publius later clarifies that the question would ultimately be decided by convention.[31]

Notwithstanding the "great force" in the reasoning of Jefferson's periodic proposal, Publius presents several arguments against it. To be sure, some of these arguments are tailored to the precise question at hand—how to enforce the constitution in the midst of a separation of powers dispute. For example, Publius argues that the people are ill-suited to decide such questions because they are likely to resolve such

27. Fed. No. 50, p. 344.
28. Fed. No. 49, p. 339.
29. *Id.*
30. *Id.*
31. Fed. No. 49, p. 342

disputes in favor of the legislature. In a republic, it is the legislature—not the executive or judicial—that has "connections of blood, friendship, and of acquaintance" with the people, and the representatives "are distributed and dwell among the people at large."[32] Whatever the persuasiveness of that argument may be, its logic would seem to apply only in very narrow circumstances and not to constitutional violations generally speaking.

But other counterarguments to Jefferson's proposal would seem to be applicable to all constitutional controversies across the board. Publius explains that "every appeal to the people would carry an implication of some defect in the government."[33] So the "frequent appeals" would proportionally "deprive the government of that veneration, which time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite stability."[34] Publius goes on to explain that the efficacy of "all governments" turns on public opinion, and the strength of opinion of each citizen turns much on "the number which [the individual] supposes to have entertained the same opinion."[35] An individual will acquire "firmness and confidence" in his opinions (of the government?) "in proportion to the number with which it is associated."[36] Appeals to the people undermine an individual's faith in the constitution

32. *Id.* Publius also attacks the Jefferson proposal on very narrow grounds: that it "does not reach the case of a combination of two of the departments against a third," meaning the third department "could derive no advantage from this remedial provision." *Id.* at 342-43. But Publius declines to dwell on this counterargument, thinking it "lie[s] rather against the modification of the principle [of enforcement by the people], rather than against the principle itself." *Id.*

33. *Id.* at 340.

34. *Id.*

35. *Id.*

36. *Id.*

because it undermines rather than affirms the notion that the higher law—and thus the law on which the government rests—is settled. This invites uncertainty about the ways in which the law may be bent, and breeds suspicion that someone in the government—at the very least one of the disputing branches of government in the separation-of-powers example—is twisting the meaning of higher law for the sake of abusing the public. To Publius, the correct course of action would, if the people must insert themselves, be to fill the hole in the law not by adjudicating the merits,[37] but by ratifying a constitutional amendment.

A "still more serious objection" arises because the "whole society" is likely to be sharply divided when constitutional questions are placed before it.[38] That was not the case when the state constitutions and Articles of Confederation were established:

> [T]he existing constitutions were formed in the midst of a danger which repressed the passions most unfriendly to order and concord; of an enthusiastic confidence of the people in their patriotic leaders, which stifled the ordinary diversity of opinions on great national questions; of a universal ardor for new and opposite forms, produced by a universal resentment and indignation against the antient government.[39]

But the state constitutions and Articles enjoyed a consensus (generally speaking) only on account of the Revolution. Indeed, from Publius' point of view, the nation was at loggerheads over ratification of the Constitution of 1787—so much so that failure to ratify portended rival confederacies. How much worse matters could be, then, if a

37. Should there be any doubt about the people's role as *adjudicator* in the constitutional disputes as construed by Publius, he later says these constitutional disputes will culminate in a "trial." *Id.* at 341.

38. *Id.* at 340-41.

39. *Id.* at 341.

constitutional question were put to the entire society when solidarity was at an ebb? "[F]uture situations in which we must expect to be usually placed," he says, "do not present any equivalent security against the danger which is apprehended."[40]

The general thrust of these arguments continues in Number 50, where Publius addresses the possibility that "*periodical* appeals" are taken to the people at predetermined and fixed times, rather than on an occasional basis.[41] Publius explains that if periodical appeals to the people are situated at "short intervals," all the same arguments will apply: "the circumstances which tend to vitiate and prefer the result of occasional revisions" will arise.[42] Matters are only slightly more complicated when periodic appeals are "distant" from one another.[43] If the controversy is recent, the very same concerns will arise. If the controversy is long in the past, then the people may have little memory of it. That, in turn, will provoke the government into constitutional violations when popular review of those acts is a "distant prospect": "[P]ublic censure would be a feeble restraint on power from those excesses," because the officers transgressing the constitution are not likely to suffer the consequences of an adverse decision in "ten, fifteen or twenty years."[44] After reviewing the proceedings of Pennsylvania's Council of Censors in 1783 and 1784, he concludes that the core problem of enforcement by the people is that when such crises arise, the people will be "violently heated and distracted by the rage of party."[45] That

40. *Id.*
41. Fed. No. 50, p. 343.
42. *Id.* at 343.
43. *Id.*
44. *Id.* at 344.
45. *Id.* at 346.

problem is the problem of faction—and so of the *nemo iudex* problem—as Publius immediately makes clear: a state (or the country, for that matter) freed of parties is neither to be presumed nor desired because such a condition "implies either a universal alarm for the public safety, or an absolute extinction of liberty."[46]

How, then, should we understand Publius' final position on enforcement by the people? On the one hand, he recommends enforcement by the people in Numbers 16 and 33. But in Numbers 49 and 50, he provides an extended argument rejecting that proposition. One way to reconcile the difference would be to say that the later rejection of "appeals" to the people applies only or primarily in the separation-of-powers context. After all, Numbers 49 and 50 nominally address Jefferson's proposal for resolving separation of powers disputes. But that conclusion is unsatisfying. As we discussed just now, two of Publius' arguments against appeals to the people—that such appeals imply a "defect" in government and that each adjudication is likely to take place amidst sharp disagreement among the populace—would seem to apply generally to all constitutional violations, not just separation of powers violations.

Moreover, the "greatest objection" to periodic appeals to the people can be modified to apply to all constitutional violations.[47] That objection—which we discussed only in passing because it is couched in terms specific to the separation of powers—is that the people are likely to side with the legislature given lawmakers' "influence among the people, and that they are more immediately the confidential guardians of the rights and

46. *Id.*; *cf.* Fed. No. 10, p. 58 ("[I]t could not be a less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.").

47. Fed. No. 49, p. 341.

liberties of the people."[48] Publius further explains that the legislators would also likely be "constituted themselves the judges" because, as incumbent representatives, they are likely to gain election to the constitutional convention that decides the dispute.[49] Though tailored to Jefferson's proposal for resolving separation of powers disputes, Publius' argument here can be given greater force. The thrust of it is simply that institutions that are *closer* to the people are likely to prevail in a constitutional contest decided by the people. So, for example, in a contest between the states and the federal government, the states are likely to win: "[I]t is a known fact in human nature that its affections are commonly weak in proportion to the distance of diffusiveness of the object," and so "the people of each State would be apt to feel a stronger byass towards their local governments than towards the government of the Union."[50]

The apparent disagreement between Numbers 16 and 33, on the one hand, and Numbers 49 and 50, on the other, might be resolved by noting that each of the circumstances in which Publius encourages enforcement by the people seems to verge upon the possibility of revolution. For example, in Number 16, Publius explains that the people as "natural guardians of the constitution" could decide a dispute between the state and federal governments. The hypothetical assumes an overreach by the federal government, and that the states respond not by mere obstruction but by "open and violent exertion of an unconstitutional power" leaving "no doubt th[e] [States] had

48. *Id.* at 342.

49. *Id.*

50. Fed. No. 17, p. 107. Of course, Publius immediately caveats that the principle may be inverted if the national government enjoys "much better administration."

encroached on national rights."[51] Publius surmises that such raw exercises of state power are "not often to be made with levity or rashness" given that the people are likely to side with the federal government and thus create "danger" for state authors.[52] This kind of flagrant abuse by the states could be tolerated only in a case in which the presumed federal overarch is genuinely "tyrannical."[53] But the general point is that the people must intervene only when the states and federal government have foundered on a dispute in which at least one party—maybe both—has utterly disregarded constitutional form. As we explained in Chapter 3, it is precisely when officers vested with republican power "bec[o]me usurpers" that the people must decide.[54] In Number 16, then, the people are not merely adjudicating constitutional meaning; they are deciding between two overreaches, not unlike in a revolution against a tyrant.

The same theme continues in Number 33. Publius, as we said, explains that the "constituents" must judge "in the last" whether an officers or institution as exceeded constitutional bounds.[55] But he suggests that such recourse is appropriate only when the institution (here, the federal government) "should overpass the just bounds of its authority, and make a *tyrannical use* of its powers."[56] Publius' use of the word "tyrannical" here is important. Because the remedy when the people enforce the constitution must conform to what the "exigency may suggest and prudence justify," it will not often be

51. Fed. No. 16, p. 103.
52. *Id.* at 104.
53. *Id.*
54. Fed. No. 28, p. 178; *see supra* Chapter 3, notes 85-87 and text.
55. Fed. No. 33, p. 206.
56. *Id.* (emphasis added).

appropriate for the people to intervene. Only when the constitutional transgression marks a willful, *tyrannical* use of powers should the people raise their voices. That, too, points toward the existence of breach of the constitutional covenant verging on a revolution.

One counterargument to this view deserves attention. In an aside in Number 49, Publius remarks that a "constitutional road to the decision of the people, ought to be marked out, and kept open, for certain great and extraordinary occasions."[57] It might be thought that this comment supports the view of constitutional enforcement by the people. But that view falters for several reasons. First—and textually—it is ambiguous whether Publius is supporting this position in his own name. The suggests he is simply paying a compliment to Jefferson:

> There is certainly great force in this reasoning, and it must be allowed to prove, that a constitutional road to the decision of the people ought to be marked out, and kept open, for certain great and extraordinary occasions. But there appear to be insuperable objections against the proposed recurrence to the people.[58]

That is, Publius is simply conceding with this comment that there is force to Jefferson's proposal and that it deserves serious consideration. But the "insuperable objections" control, so Jefferson's proposal must be rejected. Second, even if the passage could be read as supporting constitutional adjudication and enforcement by the people, Publius would admit the utility of public enforcement only in certain "great and extraordinary occasions." While it is hard to give definite meaning to that locution, it seems more likely that it refers to flagrant and willful constitutional violations—indeed, tyrannical ones,

57. Fed. No. 49, p. 339.

58. *Id.*

which are likely to rupture the social compact entirely—and thus approximates revolution.

Constitutional enforcement by the people—to the extent Publius recommends it at all—is therefore available only in the most exceptional circumstances. In those circumstances, which verge on revolution, it is appropriate for the people to throw their weight behind the party most in the right in order to prevent a total overthrow of the constitutional system. But that conclusion leaves open the question of how the constitution ought to be enforced in less exigent circumstances, when violations are incidental, accidental, or not yet so severe as to throw the stability of the regime into question.

ENFORCEMENT BY JUDGES

The constitution is in need of enforcement, but if the people are unsuitable to the job, who can rise to the occasion? The only alternative to the people in a republic would be the officers of the government. Of course, Publius is sanguine that elected officers in a strict republic like America will be "fit characters," products of a "fit choice" by the people.[59] If so, they might be deliberative and reasonable and so avoid offending the constitution in the first place. But if they are not—a possibility Publius never rejects—then constitutional enforcement by officers would appear to present a paradox. If the constitution itself is law for law, if it aims to constrain lower law and extra-legal assertions of political authority, then the individuals most likely to commit a constitutional infraction (as opposed to an infraction of ordinary law) are likely to be officers

59. Fed. No. 10, p. 63.

themselves. The paradox, then, is how to arrange a system under which officers can both enforce the constitution and be the violators of it. Indeed, that is precisely the case of *nemo iudex* that constitutionalism is designed to avoid.

This section argues that Publius avoids the paradox by way of the separation of powers and, in particular, an independent judiciary with the power of judicial review. First, it reviews background principles of the doctrine of separated powers in Locke, Montesquieu, Blackstone, and in the states. The resolution of disputes among citizens by judges was, following the custom in Britain, largely understood to be an exercise of the executive power or, in the case of Montesquieu, juries. Second, it reviews the relevant passages of *The Federalist* and concludes that Publius, while adopting the classic separation of powers between legislative and executive, develops an independent judiciary and judicial review as concepts essential to constitutional enforcement. Accordingly, constitutionalism entails a division of powers and judicial review, lest the constitution go unenforced and the political officers be permitted to judge in their own cause.

The separation-of-powers backdrop against which Publius is writing must be brought into view. That backdrop is hard to pin down because, in the words of John Manning, "the intellectual history of the separation of powers reveals no single canonical version that could … serve[] as the necessary baseline" against which Publius' version (or another other version) might be compared.[60] But that does not mean there were no

60. John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1993 (2011); *see also* GERHARD CASPER, SEPARATING POWERS (1997); W.B. GWYN, THE MEANING OF THE SEPARATION OF POWERS (1965); M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS (2d Ed. 1998).

commonalities or that earlier accounts of the separation of powers cannot serve as a useful foil for *The Federalist*.

Locke, one of the earlier examiners of the doctrine of separated powers, articulated a tripartite division. But his division was between legislative, executive, and *federative* powers, rather than our framework of legislative, executive, and *judicial*. The legislative power, Locke explained, largely tracked our contemporary understanding: "The legislative power is that which has a right to *direct* how *the Force of the Commonwealth* shall be imploy'd for preserving the Community and the Members of it."[61] So too the executive, which "see[s] to the *Execution* of the Laws that are made, and remain in force."[62] One difference, though, between Locke's understanding of the executive power and our own seems to be that his view encompasses merely enforcement of the law—likely domestically—but not military affairs or interactions with other countries.[63] That hole would be filled in Locke's framework by the "federative" power, which "contains the Power of War and Peace, Leagues and Alliances, and all the Transactions, with all Persons and Communities without the Commonwealth."[64] Locke explains that the dividing line between executive and federative functions lies at the state's border. The executive

61. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT, Chap. XII, § 143, in TWO TREATISES OF GOVERNMENT, 364 (Peter Laslett ed.). Diamond notes that Locke's understanding (and our own) of the legislative power is "strikingly different" from Aristotle's, according to which this power was determined to be the "deliberative" power. Martin Diamond, *The Separation of Powers and the Mixed Regime*, 8 PUBLIUS 33, 36 (1978).

62. *Id.* at Chap. XII, § 144, p. 365.

63. *See* MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING, 175 et seq. (2020) (discussing the American president's "foreign affairs authority" as inherited from the Crown).

64. LOCKE, *supra* Chapter 5, note 61, Chap. XII, § 146, p. 365.

"comprehend[s] … the Municipal Laws of the Society *within* it self," whereas the federative "manage[s] … the *security and interest of the publick without*."[65] Locke acknowledges that the executive and federative powers are "almost always united"—as in the American framework—even though the powers are truly "distinct in themselves."[66] But through that admission, Locke highlights the absence of a third (or, in his framework, a would-be fourth) branch of government: the judiciary.

Montesquieu appears to replicate the Lockean taxonomy. In "every government," he says, there are three powers: "the legislative; the executive in respect to the things dependent on the law of nations; and the executive in regard to matters that depend on the civil law."[67] These would seem to parallel (respectively) the legislative, federative, and executive powers as understood by Locke. (That Montesquieu calls the latter two powers "executive" suggests his agreement with Locke that both powers are frequently lodged in the same hands.) But Montesquieu immediately clarifies that by the second power he means the power to "make[] peace or war, send[] or receive[] embassies, establish[] the public security, and provide[] against invasions."[68] And the third power involves "punish[ing] criminals" and "determin[ing] the disputes that arise between individuals"; in other words, the administration of ordinary (domestic) criminal and civil justice.[69] Montesquieu explains that he will call this third power "the judiciary power."[70]

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65. *Id.* at Chap. XII, § 147, p. 365.

66. *Id.*

67. MONTESQUIEU, SPIRIT OF THE LAWS, XI.6.

68. *Id.*

69. *Id.*

70. *Id.* He also explains that the second power—the "executive in respect to things dependent on the law of nations"—will simply be called the "executive power of the

In so dividing public powers, Montesquieu "was the first theorist to urge a tripartite division of power along the lines of the U.S. Constitution."[71]

A careful reader will note that Montesquieu appears to leave out what is the core of the American executive power: the authority to administer and carry out those laws that are promulgated and enacted by the legislature. That is, who shall take care to see that the legislature's general obligations are, in point of fact, applied in particular circumstances? The answer would seem to be that this would fall under the judicial power, for it is that power which resolves criminal and civil disputes. But that answer is unsatisfying, for Montesquieu's description of the "judiciary" power *presupposes* a dispute—that there is a citizen accused of a crime or that a civil controversy has arisen between two or more citizens. But who does the accusing? And when the civil action involves state interests—say, when the state is party to a contract that is in breach—who decides when to initiate a suit, prosecute it, or settle it? Montesquieu's construction of the judiciary power provides no answer. Montesquieu adds to the confusion when he describes the executive power as including the power "of executing the public resolutions.,"[72] without respect to whether those resolutions regard foreign or domestic affairs. That description is especially odd considering that Montesquieu had initially described the executive power as including no domestic powers except the one to "establish[] the public security." So where, in the end, does the critical power to enforce

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state."

71. Manning, *supra* Chapter 5, note 60, at 1995 (citing GWYN, *supra* note 60, at 101-02; WOOD, *supra* Chapter 2, note 154, at 152).

72. MONTESQUIEU, SPIRIT OF THE LAWS, XI.6.

the law arise in Montesquieu's framework? Where is the line between the executive and judiciary?

That ambiguity suggests that Montesquieu's view of the separation of powers diverges substantially from the American view, to the extent we can speak of one view. We must hasten to add that this divergence becomes more dramatic when we look at who exercises the judiciary power according to Montesquieu. He explains that most European kingdoms of his day enjoyed "moderate government" because the king left "the third [power] to his subjects."[73] He explains that that means the "judiciary power ought not be given to a standing senate"—or presumably any standing body of citizens—but "should be exercised by persons taken from the body of the people, at certain times of the year, and consistently with a form and manner prescribed by law, in order to erect a tribunal that should last only so long as necessity requires."[74] And the "judges," which is to say those taken from the great body of the people, "ought … to be of the same rank as the accused, or, in other words, his peers," so that "he may not imagine he is fallen into the hands of persons inclined to treat him with rigour."[75] In other words, Montesquieu is not describing a judge on the British or later American model, but a *jury*.[76] In Montesquieu's view, there does not appear to be a professional class of judges at all, in contrast to the

73. *Id.*

74. *Id.*

75. *Id.*

76. *See* VILE, *supra* Chapter 5, note 60, at 93 ("[I]n certain respects Montesquieu's statements in this chapter differ considerably from what he actually knew to be the case in England. For example, he writes of the judiciary as if it contained no professional judges, as if juries were judges of both fact and law. The reality of English life was, as Montesquieu himself notes elsewhere, quite different form the ideal situation depicted in XI, 6.").

legislative and executive bodies, which "may be given rather to magistrates or permanent bodies, because they are not exercised on any private subject."[77]

Blackstone captured the traditional English view, which Montesquieu had tweaked and Locke had left unstated. According to that view, the judicial power is "lodged in the society at large," which is to say it is a power bound up with the concept of sovereignty.[78] Blackstone explains that it is impractical to entrust the power to resolve disputes to the people generally and so in England "this authority has immemorially been exercised by the king or his substitutes. He therefore has alone the right of erecting courts of judicature."[79] For sake of clarity, Blackstone then explains that this is not a necessary arrangement because the king enjoys the executive power and the judicial power is merely a subspecies of executive power.

> [T]hough the constitution of the kingdom hath entrusted him with the whole executive power of the laws, it is impossible, as well as improper, that he should personally carry into execution this great and extensive trust: it is consequently necessary that courts should be erected to assist him in executing this power; and equally necessary that, if erected, they should be erected by his authority. And hence it is that all jurisdictions of courts are either mediately or immediately derived from the crown, their proceedings run generally in the king's name, they pass under his seal, and are executed by his officers.[80]

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77. MONTESQUIEU, SPIRIT OF THE LAWS, XI.6; *see also* THOMAS L. PANGLE, MONTESQUIEU'S PHILOSOPHY OF LIBERALISM: A COMMENTARY ON *THE SPIRIT OF THE LAWS* 132 (1973) ("The judicial power will be made less 'terrible' and its separation of the other powers will be reinforced if it is in part even directly to the people by means of the jury system. The constant rotation of judges will insure against the courts become the tools of any individuals."); Treanor, *supra* Chapter 1, note 123, at 467 ("But, when Montesquieu spoke of the judiciary, his focus was on juries, not judges, which made it hard to conceive of the judiciary as a separate department of government.").

78. BLACKSTONE, COMMENTARIES, at *266.

79. *Id.*

80. *Id.* Blackstone strains mightily to defend the coherence of this view against the *nemo*

William Treanor explains how this hodgepodge of diverse separation-of-powers theories influenced American state practice in the decades leading up to ratification. Prior to the Revolution, colonial courts were to a great extent subject to legislative control, although judges were finally answerable to the executive. Legislatures "resolved private petitions, which were often disputes between parties; they tried cases in equity; they granted new trials."[81] Colonists preferred judicial resolution by locally elected legislatures because judges served at the king's pleasure. Ultimately, however, these cases were appealable to the Privy Council,[82] reinforcing the Blackstoneian framework.

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iudex problem. He hastens to add that it is nothing less than appropriate for the king to delegate the judicial power to inferiors because the king is "the proper person to prosecute for all public offences and breaches of the peace, being the person injured in the eye of the law." *Id.* But of course the prosecutorial power is also delegated to subordinates and is, like the judicial power, exercised only in the king's name. Blackstone takes a different tack in the related problem when the defendant is named as a defendant in a lawsuit. That cannot be, he says, because the king "owes no kind of subjection to any other potentate on earth" and so "no suit or action canoe brought against the king, even in civil matters, because no court can have jurisdiction over him." *Id.* at *242. This is the doctrine of sovereign immunity, which Publius defends. *See* Fed. No. 81, p. 548-49 ("It is inherent in the nature of sovereignty, not to be amendable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union."). The prosecution and sovereign immunity problems are largely identical in substance: the king acts as both party and judge. But Blackstone does not see fit to apply the *nemo iudex* principle equally, saying that in the former case the contradiction will be allowed because the king has delegated the judicial power to a subordinate, eliminating the contradiction. But the same courtesy is not extended in the case where sovereign immunity would be said to apply. One could resolve the tension by noting that the king consents to jurisdiction in the first case by bringing the prosecution in the first instance, and that when the king is a defendant in action he can waive sovereign immunity as a defense, thus consenting to jurisdiction. But Blackstone appears to reject that possibility when he says that private citizens can seek redress against the crown for private harms in chancery. There, however, the king is not "compel[led]" to perform, but rather "persuade[d]" by the chancellor to see to it that the private contract is completed. BLACKSTONE, COMMENTARIES, at *243.

81. Treanor, *supra* Chapter 1, note 123, at 468.

82. *Id.* (citing WOOD, *supra* Chapter 2, note 154, at 155, 159; Christine A. Dean, *The*

But after the Revolution, state constitutions largely followed Montesquieu in declaring a tripartite division of government powers, including an independent judiciary. But, as Treanor observes, "judicial powers and independence remained severely limited," with "[l]egislatures increasingly resolv[ing] private disputes."[83] Judges became the object of legislative selection and removal. Post-Revolution state constitutions did not increase judicial independence, they simply reclassified the judicial power from a lesser-included power of the executive to a less-included power of the legislature.

Publius was aware of this theoretical history of the separation of powers. The introductory essay (Number 47) to the series of essays on the doctrine of separated powers states the tripartite division of powers plainly and explains that their combination

Constitutional Commitment to Legislative Adjudication in the Early American Tradition, 111 HARV. L. REV. 1381 (1998)). Treanor also points out that appeal to the Privy Council was outrageous to the colonists because the Privy Council no longer had jurisdiction to hear appeals from common law courts in England, but retained jurisdiction over appeals from colonial legislatures and governors. Accordingly, the appeals process from the colonies did not parallel appeals at home in England.

83. *Id.* (citing WOOD, *supra* Chapter 2, note 154, at 155-56, 454); *see also* Kevin Arlyck, *The Executive Branch and the Origins of Judicial Independence*, 1 J. AM. CONST. HIST. 343, 350 (2023) (describing several adjudicatory acts by state legislatures, including "reopening cases already decided.").

"in the same hands" must be "pronounced the very definition of tyranny."[84] In doing so, Publius pays special attention to Montesquieu[85] and to state practice.[86]

Publius was also aware of this legislative turn in its development. *The Federalist* betrays a consistent worry that legislatures are the most acquisitive—and thus the most dangerous—branch of government.[87] That worry motivates the inquiry in Number 10.[88] There, Publius poses the question: "[W]hat are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens; and what are the different classes of legislators, but advocates and parties to the causes which they determine?"[89] The arch case of this legislative adjudication in Publius' mind is not, as Treanor suggests, an appeal of civil cases from ordinary courts to the chief legislative body. Rather it is generally applicable and prospective laws, such as those "concerning

84. Fed. No. 47, p. 324. William Kristol observes that the "sacred maxim" of the doctrine of separated powers has "human authors, human beginnings; one cannot treat the separation of powers as something sacred and therefore pure, refusing to mix the powers at all; the separation of powers requires human support and contrivance; human liberty requires an understanding of the human origins of political principles." And yet Publius nevertheless treats the doctrine as "sacred," refusing to "question or investigate the grounds of the separation of powers." William Kristol, *The Problem of Separation of Powers*: Federalist *47-51*, in SAVING THE REVOLUTION: THE FEDERALIST PAPERS AND THE AMERICAN FOUNDING (Charles R. Kesler, ed.) (1987).

85. *Id.* at 324.

86. *Id.* at 324.

87. Perhaps Publius' most celebrated remark on this propounds that "[t]he legislative department is every where extending the sphere of activity, and drawing all power into its impetuous vortex." Fed. No. 48, p. 333.

88. Fed. No. 10, p. 56 ("The instability, injustice and confusion introduced into the public councils, have in truth been the mortal diseases under which popular governments have every where perished.").

89. *Id.* at 59.

private debts" or the "apportionment of taxes."[90] The decisions of the legislature are so granular and easily applicable that they may as well be adjudications in a court of law.[91] These kinds of legislative overreaches—and the inability of the executive to check adjudications by the legislature and block such overreaches—is the genesis of Publius' theory of the independent judiciary.

Publius' first confrontation with the judiciary occurs relatively early in *The Federalist*—in Number 22—in the course of a critique of the Articles of Confederation. The discussion emphasizes that the judiciary must be independent, which is to say with sufficient separation from the legislative authority. But at this juncture, without a comprehensive discussion of the separation of powers generally or the particular powers vested in legislatures or executives, the discussion in Number 22 appears incomplete. It assumes the purpose of judicial independence without fully explaining it.

Publius alleges that the "want of a judiciary power" "crowns the defects of the confederation."[92] That this defect is a "crown"—that it is superlative, or a capstone—is not mere rhetoric. Publius makes the remark on the heels of several deep critiques of the Articles, including that the Congress cannot regulate foreign commerce because it lacks influence of the domestic economy; that it is incapable raising an army; and a host of problems associated with the equal suffrage principle across the states. Underlying each of these critiques is a common principle: Even if the Congress under the Articles were vested with the parchment power to accomplish some goal, the national government

90. *Id.* at 59-60.

91. Hence, "[e]very shilling with which they over-burden the inferior number [with a tax], is a shilling saved to their own pockets." *Id.* at 60.

92. Fed. No. 22, p. 143.

lacks enforcement mechanisms to make exercises of such powers effective. "Laws are a dead letter without courts to expound and define their true meaning and operation."[93]

Independence, in turn, is said to be critical to proper legal interpretation. It is impossible to give a law its "true meaning and operation" if the court, at the time of judgment, is beholden to another. When a court operates with multiple judges, it is true, we can expect "contradictions … from difference of opinion" among the judges.[94] Those differences do not, without more, carry an odor of impropriety, for the differences are likely to arise not on the basis of diverging interests but because "[t]he diversity in the faculties of men" are "different and unequal."[95] That problem can never be overcome.[96]

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93. *Id.*

94. *Id.* at 144.

95. Fed. No. 10, p. 58. Those faculties, in turn, are beset by "imperfection," which might be the origin of different opinions. Fed. No. 37, p. 236. And measuring those faculties has "no place in the catalogue of known arts," suggesting that those with imperfect judgment are difficult to screen out certain positions. Fed. No. 79, p. 533. For that reason, we must hasten to add that the diverse character of men's faculties may influence their passions as well, because "opinions and … passions will have a reciprocal influence on each other." Fed. No. 10, p. 58. It must also be said that, in the extreme case, some men's weaker faculties obstruct them from ascertaining their true interests. For the foregoing reasons, one might conclude that even on the assumption that judges reach differing conclusions because their faculties differ in strength, that root cause might work through passion and interest, and therefore might be thought improper.

96. And perhaps there is no reason to try. Publius indicates that the supreme court at least will sit as a panel. *See* Fed. No. 81, p. 543. (describing the supreme court as "being composed of a distinct body of magistrates"). Though it is far from certain, we might infer from the text of the Constitution that there must be several members of the Supreme Court. *See* U.S. CONST. art II, § 2 (referring to "judges of the supreme Court"). Yet Publius nowhere justifies his assumption that the Supreme Court will comprise (or sit as) as panel. Perhaps what he has in mind is that appellate tribunals in England, such as the Privy Council, also were not constituted by a single individual. Indeed, in the same number he calls attention to the fact that in Britain "the judicial power in the last resort, resides in the house of lords," which is comprised of many members. Fed. No. 81, p. 542. That the Supreme Court and these other tribunals will be composed of many members should give confidence that the permanent weaknesses of some judge's minds

Yet Publius adds that judges might reach divergent opinions for more nefarious reasons: "[T]here [is] much to fear from the bias of local views and prejudices, and from the interference of local regulations."[97] That is to say, if judges are not insulated from the influence of interested or passionate parties—those with prejudices—then judges may feel they have no choice but to twist the result and distort justice. "[N]othing is more natural to men in office," Publius explains, "than to look with peculiar deference towards the authority to which they owe their official existence."[98] This is a breakdown of the architectonic principle undergirding the separation of powers, that the rights of the office must be connected to the interests of man occupying the office.[99] The rights of the judicial office are represented here as the prerogative to exercise judgment impartially, to do right as right seems. A judge's private interests must be such that they need not interfere with impartial judgment. But when judges are rendered materially dependent on others, that insulation evaporates. A judge's private interests becomes subordinate to the wishes of his overseers; his independent judgment quickly follows.

Publius admits in this passage that judicial independence isn't an unalloyed good. Uniformity in legal application is critical to ensuring that the people have confidence in the administration of their government. And, as we just explained, even when judges are independent, they are likely to view matters differently given differences in their

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and their changing humors might not influence the outcome of cases too often; a majority will be needed to decide the case. But that explanation does little to assuage fears about the perversion of justice in inferior federal courts, which might be (and still are) largely composed of a single jurist.

97. Fed. No. 22, p. 144.

98. *Id.*

99. *See* Fed. No. 51, p. 349.

faculties. Should the court system not have a single tribunal of last resort, these differences of opinion will multiply. And "confusion" will arise from "contradictory decisions of a number of independent judicatories."[100] It is therefore "necessary to establish one court paramount to the rest."[101] That is to say, the nation's courts must in a certain respect constitute a single system. If there exists one court exercising a "general superintendence" over all other courts, then that one court will be able to ensure a "uniform rule of civil justice."[102] Preventing a "hydra"[103] of many independent court systems is no small matter, as Publius later explains. In the presence of conflicting judgments, parties—even states, might "appeal to the sword," and so "dissol[ve] … the compact," which is to say the union.[104] That would return America to the state of affairs witnessed under the Articles of Confederation—and the threat of civil war. Better that the nation's court systems appear, at least from one perspective, as "a harmonious and consistent WHOLE."[105]

We receive a clearer account of the purposes of judicial independence only when Publius turns to his full treatment of the judiciary, in Numbers 78 through 83. Number 78 has been celebrated as the *locus classicus* of Publius' theory of judicial review and its justification.[106] But as Garry Wills has pointed out, that consensus interpretation sits

100. Fed. No. 22, p. 143; *see also* Fed. No. 80, p. 535 ("Thirteen independent courts of final jurisdiction over the same causes, arising under the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed.").

101. Fed. No. 22, p. 143-44.

102. *Id.*

103. Fed. No. 80, p. 535.

104. *Id.*

105. Fed. No. 82, p. 553.

106. *See, e.g.*, James Stoner, *Constitutionalism and Judging in* The Federalist, in SAVING THE

uncomfortably with the text. For one, Number 78 seems concerned primarily with explaining the "*limits* on judicial power," not on praising the power of courts.[107] Publius emphasizes that the judiciary is the "weakest" of all the branches of government; that it can take "no active resolution whatsoever"; and that it is in "continual jeopardy of being overpowered, awed or influenced by its coordinate branches."[108] It is the "least dangerous" branch of government.[109] For another, Number 78 pays more attention to defending judicial review against attacks that it is not republican—that it "impl[ies] a superiority of the judiciary to the legislative power"—than it does to justifying the existence of judicial review in the first place.[110] There is much to credit in both of Wills' criticisms, including that Publius later pays respect to vertical dualism when he says "the laws ought to give place to the constitution," yet concedes that "this doctrine is not deducible from any circumstance peculiar to the plan of the convention."[111]

Wills' criticism of the literature harbors some truth. But it falters where he says that Number 78 is about the superiority of the legislature and that "judicial review *demands* legislative supremacy."[112] Wills understands legislative supremacy and

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107. WILLS, *supra* Introduction, note 25, at 137.

108. Fed. No. 78, pp. 523.

109. *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1986); *see also* Fed. No. 78, p. 522.

110. Fed. No. 78, p. 524.

111. Fed. No. 81, p. 543.

112. WILLS, *supra* Introduction, note 25, p. 135.

republicanism to be synonymous.[113] But that distorts the definition of republicanism that Publius embraces in Number 39 and that we covered in depth in Chapter 1. Republicanism requires dependence on the people, that the people originate and sanction the officer in the office and also have power to remove. Publius indeed defends the republican character of the judiciary in Number 78—hence his concern at the beginning of that essay with "[t]he mode of appointing judges" and "[t]he tenure by which they are to hold their places."[114] The method of appointment receives little attention in light of the fact that the mode is "the same with that of appointing the officers of the union in general," and that topic had been discussed in Numbers 66 (the Senate) and 76 (the executive).[115] And so it is the discussion of *good behavior* in Number 78[116] and the defense of impeachments as the method of removal in Number 79 that serves as a defense of the judiciary's republicanism.[117] The standard of good behavior, the thought goes, navigates between the demands of republicanism, on the one hand, the nature and character of

113. *See id.* at 137 ("Hamilton asks first if [the judiciary's] jurisdiction fits the republican character of the American people. That question can only be given a positive answer if the legislature remains supreme; No. 78 is devoted to proofs of that supremacy.").

114. Fed. No. 78, p. 521.

115. *Id.* at 522; *see also* Fed. No. 66, p. 449 ("There will, of course, be no exertion of *choice* on the part of the senate. They may defeat one choice of the executive, and oblige him to make another; but they cannot themselves *choose*—they can only ratify or reject the choice, of the president."); Fed. No. 76, p. 512 ("The person ultimately appointed must be the object of his preference, though perhaps not in the first degree. It is also not very probable that his nomination would often be overruled. The Senate could not be tempted by the preference they might feel to another to reject the one proposed; because they could not assure themselves that the person they might wish would be brought forward by a second or by any subsequent nomination.").

116. Fed. No. 78, p. 522.

117. Fed. No. 79, p. 532-533 (explaining that the impeachment of judges is "the only provision on the point which is consistent with the necessary independence of the judicial character.").

adjudication, on the other. But nowhere is legislative supremacy a component of the defense of the courts' republican character.

Wills would have seen this error had he finished the paragraph in Number 81. The full passage reads:

> I admit … that the constitution ought to be the standard of construction for the laws, and that wherever there is an evidence opposition, the laws ought to give place to the constitution. But this doctrine is not deducible from any circumstance peculiar to the plan of the convention; *but from the general theory of a limited constitution*; and as far as it is true, is equally applicable to most, if not to all the state governments. There can be no objection therefore, on this account, to the federal judicature, which will not lie against the local judicatures in general, and *which will not serve to condemn every constitution that attempts to set bounds to the legislative discretion*.[118]

This is to say that judicial review does not arise from republicanism (understood as legislative supremacy or otherwise), nor is it implicit in the idea of law more generally. But it is implicit in the concept of constitutionalism.

That is why Publius' discussion of judicial review in Number 78 centers on constitutions generally, not any particular provision of the Constitution of 1787. "[E]very act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void."[119] "To deny this," Publius explains, "would be to affirm, that the deputy is greater than his principal; that the servant is above his master … that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid."[120] That rule is a general principle of agency law: When a principal does not authorize an action, and the agent performs it anyway, then the action is *ultra vires*. it is

118. Fed. No. 81, p. 543 (emphasis added).

119. Fed. No. 78, p. 524.

120. *Id.*

not an act of the agent *qua* agent, and so does not bind the principal. And the rule applies to *all* constitutions. Publius explains that legislative authorities cannot be "themselves the constitutional judges of their own powers" at least where that proposition "is not to be collected from any particular provisions in the constitution."[121] The remark here is not confined to constitutional systems that also are republican, much less those that achieve the high standards of strict republicanism. All political systems other than despotisms must have a legislative authority, otherwise there can be no attainable rule-of-law principle. That Publius intends the remark to apply broadly to all constitutions is confirmed by his repetition of it in the republican setting.[122]

But if the legislative authority cannot judge the extent of its own powers, for that would violate the principle that the source of those powers—the people by and through the constitution—remains supreme, who should be the judge? None other than an independent judiciary. In contrast to the view that would allow legislatures to judge the extent of their own powers, "[i]t is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority."[123] A constitution is a "fundamental law," and it must be "regarded by the judges" as such.[124] And because the judicial power fundamentally regards the ability to resolve disputes in accordance with law—including when legal interpretation is required—judges are

121. Fed. No. 78, p. 524-525.

122. *Id.* ("It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents.").

123. Fed. No. 78, p. 525.

124. *Id.*

permitted to prefer the constitution as a rule of decision in a particular case over and against an on-point statute.

These results should be unsurprising given our investigation into Publius' theory of constitutionalism. They are straightforward applications of vertical dualism in a strictly republican setting. Higher law is authorized by—as directly as possible—the people. And lower law, which issues from the legislative body, must be authorized by and thus comply with higher law. A legislative body might seek to go outside the higher law in some instances, which would amount to subordinating "the intention of the people to the intention of their agents."[125] But horizontal monism and founding prevent the legislature from relying on an independent source of authority when it takes action (consciously or not) in contravention of the higher law, of the constitution. The legislators may not rely on the claim that they have power independent of the legal system, or that they are vested with powers that precede the creation of the constitution. The constitutional structure makes clear that at the founding "the courts [were] … an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority."[126] Accordingly, the legislature cannot rely on any independent source of authority—that preexists the founding or is founded on political authority outside of law—for the purpose of contravening the constitution.

The connection between the analysis of judicial review in Number 78 and that the constitution can be enforced only by judges in 81 is reflected in the parallel usage of the

125. *Id.*

126. Fed. No. 78, p. 525.

term "limited constitution," which we have not had occasion to address. Publius explains in Number 78 that the

> "complete independence of the courts is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.[127]

So too in Number 81: the power of judicial review is "deducible" only "from the general theory of a limited constitution."[128] It might be thought that Publius' definition of a "limited constitution" in Number 78 is narrower than the definition we have provided in Chapters 3 and 4. That is true to the extent that the formulation of founding, horizontal monism, and vertical dualism does not, on the surface, amount to "specified exceptions to the legislative authority." But there is a tight relationship (perhaps an identical one) between a limited constitution and constitutionalism as we have described it. If it is correct that constitutionalism implies a judicial system that serves as a check on the legislative function, that would be a limitation on the legislature. It would be an exception to its power. It is likely no accident that Publius raises as an example of a limited constitution the prohibition on bills of attainder; such laws are a usurpation of

127. *Id.*

128. Fed. No. 81, p. 543.

independent judicial authority.[129] Without an independent judicial authority, then, the exceptions that obtain in a limited constitution would "amount to nothing."[130]

Now we are able to see more clearly why judicial review is not, as in Wills' view, connected to legislative supremacy. Legislative supremacy contradicts constitutionalism, because the legislative body—the body that generates ordinary law in the course of ordinary politics—is beholden to the higher law. And the higher law cannot be judged—or amended, for that matter—by the legislature alone. True, Publius presses the view that the doctrine of judicial review does not "by any means suppose a superiority of the judicial to the legislative power."[131] But it would be a mistake to read that remark as implying the reverse: that judicial review implies the superiority of the legislative to the judicial power. That is because "the power of the people is superior to both."[132] To commentators like Wills, the legislative seems superior only because the judiciary is weak. But such remarks are not normative remarks about which branches ought to prevail or predominate; they are remarks about the natural character of the respective powers, and it is from that character around which a constitutional regime must be designed. Constitutionalism requires a judicial check on the legislative power, lest the constitution be ignored; because the judiciary is by nature weak, the constitution ought to give judges certain protections—a tenure of good behavior, a salary that shall not be

129. *Cf.* Akhil Reed Amar, *Attainder and Amendment 2:* Romer*'s Rightness*, 95 MICH. L. REV. 203, 209-10 (1996) ("Legislatures operating in the ordinary legislative mode do not typically abide by … adjudicative procedures, and so trial and sentencing by legislatures are banned.").

130. Fed. No. 78, p. 524.

131. *Id.* at 524.

132. *Id.* at 525.

diminished, and the insulation of the impeachment process—so that the judiciary can withstand the buffeting winds of the legislature.

Judicial review is also not represented here as a consequence of the separation of powers per se. In Number 78, the judiciary is described as presenting an obstacle to *legislative* authority, not executive authority. An independent judiciary is an "excellent barrier to the encroachments and oppressions of the representative body";[133] the "limitations" that the judiciary must enforce in a limited constitutions are "specified exceptions to the legislative authority";[134] judicial review is first described as the ability "to pronounce legislative acts void";[135] Publius calls attention to the view that "the legislative body are themselves the constitutional judges of their own powers," but does not do so for such a view about the executive;[136] judicial review consists in preferring the "declar[ations] in the Constitution" to "the will of the legislature";[137] an independent judiciary is "considered as the bulwarks of a limited Constitution against legislative encroachments";[138] and the judiciary can "operate[] as a check upon the legislative body."[139] This opposition between legislature and judiciary continues throughout the remainder of the sequence of papers on the judiciary. For example, undiminished judicial salaries are required to accomplish a "complete separation of the judicial from the

133. *Id.* at 522.
134. *Id.* at 524.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*

legislative power";[140] the extent of judicial power must be "coextensive with [the] legislative";[141] the question of judicial review is stated as "whether [the judiciary] ought to be a distinct body, or a branch of the legislature";[142] Publius praises states that have "committed the judicial power, in the last resort, not to a part of the legislature, but to distinct and independent bodies of men";[143] and, given the judiciary's passivity, he dismisses criticisms that courts could ever accomplish "deliberate usurpations on the authority of the legislature."[144] Judicial review is presented entirely as a solution to a problem arising out of the legislature. The president and other executive officers are for all intents and purposes absent.[145]

That is a surprising result given the long history of tripartite separation-of-powers frameworks, to which Publius pays respect throughout *The Federalist*.[146] But the concern

140. Fed. No. 79, p. 531.

141. Fed. No. 80, p. 535.

142. Fed. No. 81, p. 542.

143. Fed. No. 81, p. 544.

144. Fed. No. 81, p. 546.

145. The only substantive mention of the executive occurs when Publius, remarking on the weakness of the judiciary, points out that that the "executive not only dispenses the honors, but holds the sword of the community." Fed. No. 78, p. 522. He follows up this point by noting that the judiciary "depend[s] upon the aid of the executive arm even for the efficacy of its judgments." For a recent theoretical analysis of the distinction between law *creation* and law *application*, which conceptualizes executive functions as overlapping with judicial functions (but not legislative functions), *see* PAOLO SANDRO, THE MAKING OF CONSTITUTIONAL DEMOCRACY: FROM CREATION TO APPLICATION OF LAW (2022).

146. Arlyck gives a reason why that might be correct. Although slightly anachronistic, Arlyck explains that the early republic exhibited a sort of symbiotic relationship between the executive and judiciary. In fact, the "earliest and most insistent assertions of the inviolability of judicial decision-making came not from courts, but instead from the federal executive branch." Arlyck, *supra* Chapter 5, note 83, at 346. On Arlyck's account, the executive sought to bolster judicial decision-making because doing so provided cover for executive officials when foreign entities complained about, for

might be assuaged by pointing out that the executive in large part is charged with—need it be said?—executing the ordinary laws passed by the legislature. That is to say that the executive is *itself* an agent of the legislature, which is in turn an agent of the people by way of the constitution. To that extent, then, the problem of legislative overreach includes and subsumes executive action.[147] Such a response goes a long way to explaining the curiosity in the essays on the judiciary, but it fails to address the point—recognized implicitly in Number 74—that the president retains unique powers under the constitution unrelated to the legislature.[148] Are such powers, which are vested in the president by the constitution and not susceptible to legislative preemption, subject to judicial review? Although the arguments Publius presents regarding the legislative branch would seem to apply to the executive *mutatis mutandis*, Publius does not address the question or provide an answer.[149]

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example, foreign crises, maritime war, and prize cases. *See id.* at 347. By shifting responsibility for adverse decisions onto the courts, the executive was able to deflect anger away from it and preserve needed flexibility for negotiation. While there is no evidence that Publius had something like Arlyck's thesis specifically in mind when he left out the executive in his theory of judicial review, perhaps he shared the understanding that the courts' relationship with the executive could not be entirely compared to its relationship with the legislature.

147. That conclusion is bolstered by the fact that, when the president signs a bill or vetoes it, he acts in a legislative capacity. *See* Fed. No. 47, p. 328 ("In the very Constitution to which it is prefixed, a partial mixture of powers has been admitted. The Executive Magistrate has a qualified negative on the Legislative body.").

148. Indeed, one such power—the pardon power—is quasi-judicial, for it tempers "the rigor of the law" applied by courts and instead "dispense[s] … the mercy of the government." Fed. No. 74, p. 502.

149. Perhaps that is because constitutionalism, which I have argued is the motivator for judicial review, seems primarily concerned with *legislation* rather than with enforcement. It is concerned with the authority by which lower law is promulgated and especially whether it is authorized by higher law. If correct that would explain why Publius pays special attention to judicial review of state legislation in Number 80. *See* Fed. No. 80, p. 535 ("The states, by the plan of the convention are prohibited from doing

This section has argued that Publius' theory of constitutionalism requires enforcement by a separate, independent judiciary through the doctrine of judicial review. Fundamentally, that is because constitutionalism seeks to constrain and channel government power through legal means, specifically through founding, horizontal monism, and vertical dualism. That implies some mechanism through which the ordinary lawmaking process can be held to account to higher law. Publius answers that that mechanism is an independent judiciary with the power of judicial review.

It is telling that Number 78's first substantive observation is that judicial independence (specifically appointment for good behavior) "[i]n a monarchy … is an excellent barrier to the despotism of the prince" and "[i]n a republic it is no less excellent a barrier to the encroachments and oppressions of the representative body.[150] From the start then, we are invited to compare judicial review to the state of affairs in Britain. There, the king—a "will independent of the society itself"—counterbalances the excesses of the people; the king is therefore in need of a check that he does not become a despot. But Publius rejects the possibility of such an independent will in a republic. It violates the principle of strict republicanism, according to which it is the people's will that should prevail in the first and in the last. But the British problem still stands in need of an American solution. For Publius, the answer is not to create an independent *will*, but an

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a variety of things. … No man of sense will believe that such prohibitions would be scrupulously regarded, without some effectual power in the government to restrain or correct the infractions of them. This power must either be a direct negative on the state laws, or an authority in the federal courts, to over-rule such as might be in manifest contravention of the articles of union."). Within the American framework, state legislation is simply another kind of inferior law, parallel to (though in some cases overruled by) federal statutory law. By contrast, mere execution does not involve lawmaking.

150. Fed. No. 78, p. 522.

independent *judgment*. The judiciary can "truly be said to have neither Force nor Will, but merely judgment";[151] so long as it exercises only judgment in accordance with law it can serve to counteract the excesses of the people or their representatives in the carrying out of ordinary politics. The solution to the paradox of constitutional enforcement by officers lies in this division.

LIMITS OF CONSTITUTIONALISM

Constitutionalism represses the *nemo iudex* problem and makes republican rule sustainable for the first time. But it isn't perfect. All societies are susceptible to "mortal feuds" which spread a "conflagration through [the] whole nation … proceeding either from weighty causes of discontent given by the government, or from the contagion of some violent popular paroxism."[152] "No form of government," Publius continues, "can always either avoid or controul them."[153] Constitutionalism is no different. But in light of how constitutionalism handles the *nemo iudex* problem, what are its specific limitations, at least as recognized by Publius. This section briefly interrogates three: that harmful provisions might end up in the constitution, thereby destabilizing the regime; that a constitutional provision might be so indeterminate as to work at cross purposes with constitutionalism; and that constitutional enforcement by independent judges might itself by vulnerable to *nemo iudex* concerns. The section discusses each in turn and Publius' responses.

151. Fed. No. 78, p. 523.
152. Fed. No. 16, p. 104.
153. *Id.*

Harmful Provisions. Number 37 makes the general point that drafting the Constitution of 1787 was not an easy task. "[A] faultless plan was not to be expected."[154] Delegates at Philadelphia faced a number of theoretical difficulties: other confederations and republics were founded on error, so there were no good examples upon which to model the constitution; security (along with its prerequisite, energy) and liberty sit in tensions with one another, so crafting a government that can provide for both requires hard choices; and drawing a line between the state and federal governments' powers is difficult given the difficulty of ascertaining knowledge of the institutions of man, man's natural fallibility, and the difficulty of expressing ideas in words. But the convention also faced practical difficulties, in particular the warring interests of different states—especially large and small—as well as factional differences large and small. As Publius points out at the very beginning of *The Federalist*, "certain class[es] of men" will stand to gain or lose from ratification of the Constitution, and will promote or criticize it on that basis.[155] The same thought applied at the convention, if in a different posture. Certain classes of individuals and their representatives might try to game the constitutional system long before a single ratification vote could be cast.

In explaining these difficulties, Publius impliedly concedes that the Constitution of 1787 might well have been better. But that concession does not reach so far as to admit that some provisions of the Constitution will do mischief and could undo the social compact. Quite the opposite. As a rhetorical and practical work, *The Federalist* adopts the point of view that the Constitution is necessary to reinforce and protect the union.

154. Fed. No. 37, p. 232.

155. Fed. No. 1, p. 4.

The closest Publius comes to departing from that general view in support of all constitutional provisions is the astonishing discussion of slavery in Number 54. Publius' address of the slavery issue arises in the context of population counting for purposes of representation in the House of Representatives as well as direct taxes. For that reason, the question of slavery places Publius in a tight bind.[156] On the one hand, he is a defender of the Constitution and must cast the Three-Fifths Clause in the most positive light. That means he cannot endorse the view that would have enjoyed support from many New Yorkers that "[s]laves are considered as property, not as persons," and so ought not count at all toward representation.[157] On the other hand, admitting that slaves are not mere property poses a challenge for Publius' theory of republicanism. Can the exclusion of a

156. The curiosities of Number 54 only multiply if we unmask Publius and reveal the true writer. The scholarly consensus is that Madison wrote Number 54. *See*, *e.g.*, John Kincaid, The Federalist *and V. Ostrom on Concurrent Taxation and Federalism*, 44 PUBLIUS 275, 284 (2014) (describing Madison as the author without mentioning a dispute); *see also* COOKE, at 635 (noting that it would be odd to ascribe Number 54 to Hamilton in light of a remark in Number 35 (written by Hamilton) regarding the New York Senate that directly conflicts with Number 4). But whether Madison or Hamilton wrote Number 54, each man would have been in an unusual position. Madison, a slave holder, proposed the three-fifths number in a 1783 proposal to amend the Articles of Confederation's taxing provisions, and the resolution failed. *See* GARRY WILLS, NEGRO PRESIDENT: JEFFERSON AND THE SLAVE POWER, 53 (2003). Accordingly, Madison might be thought to be privately in favor of the proposal, but could not speak his mind straightforwardly at risk of alienating New Yorkers. He therefore placed the defense of the Three-Fifths Clause and the Constitution's general protection of slavery in the mouth of one our "southern brethren." Fed. No. 54, p. 367. But of course the southern brother is a brother only to the reader, not to the writer. If Hamilton is the author, the reverse is all true. Hamilton helped to establish the New York Manumission Society, *see* RON CHERNOW, ALEXANDER HAMILTON, 214-15 (2005), and so would be thought like most New Yorkers to be uncomfortable with the Constitution's protection of slavery. But Hamilton could not have put such positions in Publius' mouth; that would push New Yorkers away from ratification. And it is perhaps for similar reasons that Hamilton also could not make the case straightforwardly, but supposed it was better to place the argument in the mouth of one of his "southern brethren."

157. Fed. No. 54, p. 367.

class of persons categorically from political participation and from the most basic enjoyments of liberty not cast doubt on the proposition that the government rests on the shoulders of the people *generally*? So as not to draw attention to this difficult position, Publius places the defense of slavery in the mouth of "one of our southern brethren."[158] That southern brother does not defend slavery per se. Rather, he defends the "barbarous policy" of the South according to which slaves are "in some respects … persons, and in other respects … property,"[159] against the position of the North on the issue of the Three Fifths Clause. That position would hold that slaves are "more compleatly in the unnatural light of property," which is *worse* than that of southern state law.[160] But it is hard not to read the southern brother's remarks, which Publius later endorses in large part,[161] and not get the impression that *The Federalist* is raising the possibility that the large body of the people can be deprived by law (higher or lower) of their liberties. That would not only deprive the regime of its republican character, but it would prove the undoing of the constitutional system.

The possibility of enacting harmful provisions by higher law is most plainly stated—once again—in Number 37. Publius points out the overall theoretical difficulty with constitution-making. Whereas America's vast "variety of interests" will have a "salutary influence" on government in ordinary lawmaking à la Number 10, it will have

158. *Id.*

159. Fed. No. 54, p. 367-68.

160. *Id.* at 368.

161. *Id.* at 371 ("Such is the reasoning which an advocate for the southern interests might employ on this subject: And although it may appear to be a little strained in some points, yet on the whole, I must confess, that it fully reconciles me to the scale of representation, which the Convention have established.").

the "contrary influence … in the task of forming" the constitution.[162] True, the supermajority requirement for establishing a constitution may prevent the most heinous provisions from becoming higher law. But here Publius admits that there is a strong inclination for parties drafting higher law to embed it with ill-considered, perhaps even evil, provisions that suit their interests. The only protection against such provisions are citizens with a "spirit of moderation" capable of forming a "just estimate of [a provision's] real tendency to advance of obstruct the public good."[163]

Indeterminate Provisions. Another danger is indeterminate provisions. These are constitutional clauses whose content is hopelessly amorphous; any officer—especially courts—who attempts to interpret and apply its language will founder on a fundamentally arbitrary choice. And that, contends Publius, is against the very purpose of constitutionalism, which is to constrain lower law and the officials charged with making, enforcing, and applying it. Enabling arbitrary decisions fundamentally places decision makers in positions where judging in their own cause is easier. Recall that in Chapter 4, Publius had explained that ordinary officials would be constrained from judging in their own cause—at least to the extent of not destabilizing the government—when constitutional provisions are sufficiently determinate the provisions constrain officials' actions. If a provision is *not* sufficiently determinate, then officials may not be so constrained.

Hopelessly indeterminate constitutional provisions can arise for two reasons at least. First, the drafting of constitutional provisions is likely to take place among a group

162. Fed. No. 37, p. 237.

163. *Id.* at 231.

of people. That will almost certainly be the case when the resulting arrangement is republican, but it is likely to occur in other circumstances as well. "[G]reat changes of established governments" virtually always are "instituted by some *informal and unauthorised propositions*, made by some patriotic and respectable citizen or number of citizens."[164] For that reason, constitutional provisions will be subject to considerable contestation. But unlike ordinary legislation, higher law must be ratified by supermajorities; in order to meet that requirement and gain enough support to end up the constitution, a provisions' language may need to be watered down to accommodate competing interests or opinions. Second, indeterminate provisions might arise simply because the words used might be imprecise, and that fault may not lie at the feet of the drafters. Even when concepts are "distinctly formed" in the minds of the drafters, "no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas."[165] Accordingly, "unavoidable inaccuracy" of meaning might arise, especially when the idea at which the constitutional provision aims is complex.[166]

Publius raises an example of the latter in Numbers 24 and 25, where he counters the criticisms that the Constitution did not make "proper provision … against the existence of standing armies in time of peace."[167] However appropriate such a provision might be—and Publius thinks it would not be—a prohibition on standing armies would

164. Fed. No. 49, p. 265.
165. Fed. No. 37, p. 236.
166. *Id.*
167. Fed. No. 24, p. 152.

be "unlikely to be observed" due to the "necessities of society."[168] That is because any provision prohibiting standing armies in times of peace leaves open

> [H]ow far … the prohibition should extend; whether to raising armies as well as to *keeping them up* in a season of tranquility or not. If it be confined to the latter, it will have no precise signification, and it will be ineffectual for the purpose intended. When armies are once raised, what shall be denominated 'keeping them up,' contrary to the sense of the constitution? What time shall be requisite to ascertain the violation? Shall it be a week, a month, or a year? Or shall we say, they may be continued as long as the danger which occasioned their being raised continues? This would be to admit that which might be kept up *in time of peace* against threatening, or impending danger; which would be at once to deviate from the literal meaning of the prohibition, and to introduce an extensive latitude of construction.[169]

The proposed prohibition would simply be too open to interpretation—not only in remote cases, but in cases that are entirely foreseeable and likely to occur. Designing men will be able to manipulate the provision so that it functionally provides no constraint on their action. If that is so, what is the point of enacting the provision in the first place into higher law? Publius does raise the question of enforcement: "Who shall judge of the continuance of the danger?"[170] But he dismisses it—without even raising the possibility of judicial review—on the ground that any enforcer of the provision would have to be a member of the federal government, yet it is the very federal officers with "discretion so latitudinary" that they retain "ample room for eluding the force of the provision."[171]

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168. *Id.* at 156.

169. Fed. No. 25, p. 160.

170. *Id.*

171. *Id.* To be sure, this is to say that the provision *may* be violated by any who might wish to violate it. It is not to be confused with a separate argument Publius makes, which is that the provision will be violated lest the body politic come under threat. It will sometimes occur that an army is "in time of peace essential to the security of the

However dangerous indeterminate provisions might be, Publius does not conclude that every provision with some indeterminacy poses a threat to the body politic. As the comment in Number 37 about the ambiguity of language suggests, virtually all legal provisions (constitutional or otherwise) will raise difficult interpretive questions. Some of them may not raise existential issues in the way the standing army question raises an issue of national defense and security. But all will be susceptible to a phenomenon Publius calls constitutional "liquidation": "All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."[172] That is to say, the sweep and force of all constitutional provisions will become clearer and clearer through repeated application to particular sets of facts. These precedents will fix the meaning of the provisions in question, thereby muting to some extent the negative consequences of inconclusive language. Whatever "questions of intricacy and nicety" arise from constitutional text, it is "time" that can "liquidate the meaning of all the parts, and can adjust them to each other in a harmonious and consistent WHOLE."[173]

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society" due to a looming threat. *Id.* at 163. And forcing the government to violate the constitution, however necessary it may be at the time, will "impair[] that sacred reverence" for the constitution and "form[] a precedent for other breaches." *Id.*

172. Fed. No. 37, p. 236. Although the possibility of "liquidation" raises interesting and varied theoretical questions, it suffices here simply to point out the existence of the possibility in Publius' theory of constitutionalism rather than its intricacies. For those intricacies, *see generally* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019).

173. Fed. No. 82, p. 553.

Judges and Nemo Iudex. In the last section, we examined how the constitution can be enforced only if there exists within it an independent judiciary capable of reviewing legislative determinations for their constitutionality. But if the enforcement of the constitution turns on judicial review, and judges are not themselves subject to further review, then might not judges judge in their own cause? (And even if those judges were subject to further review, would the question not apply to that subsequent appellate body?) If we must answer yes to these questions, then it would return us all the way back to the original problem posed by the *nemo iudex* principle: parties to a litigation deciding the outcome of that litigation according to the parties' interest or passion. The most obvious circumstance in which the problem arises would be where a judge is quite literally a party, a family member of the judge is a party, or the judge otherwise has property at stake in the litigation. But the conflict could arise in other circumstances, such as when the judge or a family member is inextricably intertwined in the dispute,[174] or even where the judge feels passionately about an issue presented by the case and cannot render an impartial decision. The Constitution provides no clear rejoinder to these concerns.

And Publius doesn't, either. In fact, his response is largely to dismiss the question as overstated. He expresses an abiding faith that judges will "consult[] nothing but the

174. *See* Sanford Levinson & Jack M. Balkin, *What Are the Facts of* Marbury v. Madison?, 20 CONSTL. COMMENTARY 255, 256 (2003) (describing Chief Justice Marshall, the author of the *Marbury* opinion as himself the "relevant public official" who signed William Marbury's commission).

Constitution and laws" when they render decision.[175] If courts have "neither Force nor Will, but merely judgment," then it would seem impossible for them to pervert justice.[176]

That said, he does contemplate the possibility of corrupt judging, and he condemns it as fundamentally identical to the problem of legislative violations of the constitution.[177] But the greater problem with the criticism, says Publius, is that it targets far too much. Indeed, it attacks the entire possibility of impartial judgment in the first instance. "It can be of no weight to say, that the courts on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature."[178] That criticism would apply to "every adjudication," not only adjudications involving constitutional issues, and so the criticism would "prove that there ought to be no judges distinct from" the legislature at all.[179]

Publius' resolute confidence in the federal courts would seem ascribable to two features of the judiciary: its weakness and its selection process. Number 78 is replete with remarks that the judiciary is weak. As we saw in the last section, the judiciary's natural feebleness requires that its independence from the other two branches be fortified. But its weakness has another consequence: that it is incapable of posing a serious threat to the people or corrupting the foundations of the regime.

> [T]he judiciary is beyond comparison the weakest of the three departments of power … [which] equally proves, that though individual oppression may

175. Fed. No. 78, p. 529.

176. *Id.* at 523.

177. Fed. No. 78, p. 526 ("The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.").

178. Fed. No. 78, p. 526.

179. *Id.*

> now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter. I mean so long as the judiciary remains truly distinct from both the legislature and the Executive.[180]

The judiciary waits for matters to arrive on its doorstep; it is the opposite of proactive. Except when a matter of constitutional concern comes before it, it construes and interprets objects—statutes and administrative actions—that are creatures of the other branches. And indeed it must "ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."[181] It is in "continual jeopardy of being overpowered, awed or influenced by its coordinate branches"; while independence provides a defense, independence does not eliminate the threat.[182] And even if the federal courts were on the same page about deliberately contorting the law against the wishes of the people, there is a failsafe: the Exceptions Clause provides that "the national legislature will have ample authority to make such *exceptions* and to prescribe such regulations as will be calculated to obviate or remove … inconveniences" arising out of the federal courts.[183]

The second point on which Publius relies is the method of selection. True, the mode of selection is identical with other principal officers of the United States—nomination by the president and confirmation by the Senate. For that reason presidents and senators will be looking for candidates who have "the requisite integrity" for office—a quality essential to the sound exercise of any office. But Publius clarifies that there are special considerations that go into judicial selections: education. In order to "avoid an

180. Fed. No. 78, p. 523.

181. *Id.*

182. *Id.*

183. Fed. No. 80, p. 541.

arbitrary discretion in the courts," courts must deploy "voluminous code[s] of law" and "strict rules and precedents," all of which "swell to very considerable bulk."[184] Accordingly, a competent lawyer earns his competence only after lengthy and laborious study. Presidents and senators must select judges who have "sufficient skill in the laws," and only a few citizens will "unite the requisite integrity with the requisite knowledge."[185] And that knowledge, which is also a knowledge of the vast "folly and wickedness of mankind," will humble and instruct the judge in the ways of "utility and dignity," and thereby make him less likely to pervert justice.

CONCLUDING THOUGHTS

The Federalist articulates an abiding confidence in the "virtue and intelligence of the people of America."[186] It is for that reason that it self-consciously undertakes—and encourages the American people to undertake—an "important and novel experiment in politics."[187] It is true, as many have argued, that the primary experiment undertaken was one of republicanism, that it was founded on the true and genuine view of republicanism, and that it would not compromise on its republicanism one iota.

But true to classical philosophy as well as the history of political experiments, Publius never contended that republicanism raises no problems of its own. It is a guarantor of liberty, yes, but it comes with its own risks: republicanism has never been

184. Fed. No. 78, p. 529. For an analysis of the relationship between American constitutional and training in the common law, *see* JAMES R. STONER, JR., COMMON-LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM (2003).

185. *Id.*

186. Fed. No. 49, p. 340-41.

187. Fed. No. 50, p. 345.

stable. Both the Constitution and *The Federalist* betray a "fervent attachment to republican government" yet express an "enlighten view of the dangerous propensities against which it ought to be guarded."[188]

This dissertation has sought to explain this difficulty and how *The Federalist* aims to show the way out. The shoal upon which republicanism has foundered was the *nemo iudex* problem—the propensity for decision makers, even in a republic, to wield public power for private benefit. It corrupts and destroys the rule of law. But it also undermines the trust that citizens who lose out in free and fair votes (for representatives or in legislatures) require in order to remain invested in the regime.

Constitutionalism is not, in the famous words of Number 10, a "Republican remedy for the diseases most incident to Republican government."[189] It is a general solution, a rule-of-law solution, that happens to be particularly consonant with the principles of republican government and promises—at least to the extent any good experiment promises—to remedy the problem. The great experiment in strict republicanism must be embarked upon with the knowledge that other forms of republican rule have succumbed to the *nemo iudex* disease. The great experiment in strict republicanism therefore requires a parallel experiment—one in constitutionalism.

Has that experiment been a success? That is a question for a subsequent manuscript. But this one should have provided critics of constitutionalism cause to revisit their opposition to constitutions generally. We indeed live in an age of democracies, or, to use Publius' term, republics. Let it be the case that that age endures for a long time. But

188. Fed. No. 49, p. 338.

189. Fed. No. 10, p. 65

even if it does, we must remember that republicanism is no panacea for unstable politics. It is not free from problems, and it does not contain within itself a solution for every problem. But Publius' theory of constitutionalism promises an antidote to some such problems. The fact that the age of democracies as endured this long is grounds to think that constitutionalism can—and has—made good on that promise.

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